IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 6

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, *Petitioners*,

v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR THE RESPONDENT.

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v.

CARY A. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., *Respondent*.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The judgments of the District Court were entered without an opinion (R. 97-101). The opinion of the United States Court of Appeals for the District of Columbia (R. 106-121) is reported in 100 F. (2d) 678.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 121). The petition for a writ of certiorari was filed on

January 31, 1939, and was granted on March 13, 1939 (R. 123). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Pursuant to contracts with the Commercial National Bank, the Secretary of War on behalf of the Canal Zone, the Inland Waterways Corporation and the United States Shipping Board Merchant Fleet Corporation, the petitioners herein, opened various deposit accounts in the Commercial National Bank, the Bank pledging certain of its assets to secure these deposit accounts. Because of these contracts, upon insolvency of the Bank, these petitioners received full payment of their deposit balance with interest either by taking over the security, as in the case of the Canal Zone officials, or from the proceeds of the sale of such securities. The respondent's predecessor in office as Receiver of the Commercial National Bank assailed the validity of the pledge agreements, and brought this suit to recover the pledged securities or their proceeds, giving credit to the various petitioners for the amount which they would be entitled to receive as general creditors of the Bank.

Two questions are urged by petitioners as grounds for reversal:

(1) Was the giving of security by the Commercial National Bank invalid?

(2) As to the Canal Zone deposit, is the United States an indispensable party defendant?

A third question is suggested in petitioners' brief, though it is not urged as a ground for reversal, and was not urged as a basis for this Court's granting certiorari. This suggestion relates only to the Merchant Fleet Corporation and the Inland Waterways Corporation, and may be stated as follows:

(3) Were the deposits of the Merchant Fleet and the Inland Waterways illegally received by the Commercial National Bank, thereby giving rise to a constructive trust?

STATUTES INVOLVED.

The applicable portions of the statutes involved are set forth in respondent's separately printed Appendix.

STATEMENT.

This case arose upon an amended Bill of Complaint (R. 1-28) filed by the Receiver of the Commercial National Bank on June 4, 1936, against the petitioners herein and other allegedly illegally secured depositors not here involved, alleging that the pledge by the Commercial National Bank to the Secretary of War to secure deposits of Canal Zone funds made in the Bank, the pledge to the Inland Waterways Corporation to secure deposits of its funds in the Bank, and the pledge to secure deposits of the Merchant Fleet Corporation, petitioners herein, were illegal and void; that the pledged bonds or their proceeds were held in trust by the various pledgees, and seeking a recovery either of the pledged bonds or their proceeds. Separate answers were filed by each of the petitioners.* Motions were made by the respondent to strike certain defenses, and for the entries of decrees *pro confesso* against the petitioners (R. 93-96). The District Court granted the motions (R. 97-101) and the Court of Appeals for the District of Columbia affirmed the judgments of the District Court (R. 21), whereupon petitioners applied to this Court for a Writ of Certiorari, which was granted.

For the sake of clarity, this brief has been divided into two parts; the first deals with the pledge

* United States Shipping Board Merchant Fleet Corporation (R. 29-73, including Exhibits); Inland Waterways Corporation (R. 73-80); Harry H. Woodring, *et al.*, (R. 82-92).

of assets securing deposits of the Canal Zone funds, and the second part deals with the pledges of assets securing the deposits of the Merchant Fleet Corporation and the Inland Waterways Corporation. Much that is said in relation to the pledge securing the deposit of the Canal Zone is equally applicable to the pledge securing the deposits of the other two petitioners, and is not repeated in the second part of the brief, but is simply indicated by cross reference.

Because of the division of the brief, it is thought desirable at this point simply to summarize the facts as to the Canal Zone deposits, and subsequently, in that section of the brief dealing with the Merchant Fleet Corporation and the Inland Waterways Corporation, a statement of facts as to these two corporations is made (pages 53 to 59).

SUMMARY OF FACTS AS TO THE CANAL ZONE DEPOSITS.

Pursuant to an agreement dated January 19, 1909, between the Government of the Canal Zone and the Commercial National Bank, various sums were deposited by Canal Zone officials in the Bank. On March 1, 1910, there was on deposit with the Bank under this agreement the sum of $1,254,754.92 (Ex. C-1. R. 17-18).

On May 11, 1910, an agreement "in renewal and amendatory" of the original agreement of 1909 was entered into between the Secretary of War, as the executive officer of the United States having supervision and control over the governmental affairs of the Canal Zone and the Commercial National Bank. This agreement provided for the deposit by the Bank of bonds of the par value of $1,294,000.00 with the General Purchasing Officer of the Isthmian Canal Commission as security for the safekeeping and prompt payment of the funds deposited under the agreement of the Canal Zone officials. Said agreement further provided that the Bank would maintain at all times acceptable bonds in such amounts that the deposits would be fully secured, and that

the Bank should have the right as deposits were withdrawn to withdraw its bonds correspondingly, and at any time substitute other acceptable bonds of equal market value for bonds then pledged.

On May 1, 1911, in accordance with the contract of 1910, the Secretary of War opened a deposit account in the Commercial National Bank and the Bank pledged with the Secretary of War by delivery to his subordinate officer the General Purchasing Officer and Chief of the Washington Office, The Panama Canal, various and sundry bonds of an aggregate par value of $791,000.00 (R. 6, 83).

The Commercial Bank was not designated by the Secretary of the Treasury as a depositary of funds of the Government of the Canal Zone (R. 43, 90) and the Secretary of the Treasury did not exact the pledge, but the Secretary of the Treasury was consulted by the Secretary of War and approved the deposit of Canal Zone funds in the Commercial Bank and the Secretary of War's proposal to take security for said deposits (R. 90).

On February 27, 1933, when the Bank suspended operations, the credit balance on deposit in the Canal Zone account was $711,622.92 (R. 6), and consisted of deposit money order funds and money order funds (R. 84).

After the suspension of the Bank, the Secretary of War, on June 16, 1933, directed the General Purchasing Officer and Chief of Washington Office, The Panama Canal, to take over the bonds which secured the deposits (Ex. C-3. R. 21-22) and, acting under a mistake of law, the Receiver of the Bank consented to the taking over of said bonds as aforesaid. The original bill of complaint in this suit was filed on July 9, 1935, and on June 4, 1936, an amended bill of complaint was filed. The answer of the Secretary of War and the Canal Zone officials was filed October 31, 1936. There is no denial in the answer that the bonds are held by the present Secretary of War and the present General Pur-

chasing Officer and Chief of the Washington Office, but it is denied that they are held in trust (R. 83).*

SUMMARY OF ARGUMENT AS TO THE CANAL ZONE DEPOSITS.

I.

National banks have no general or implied power to pledge their assets to secure deposits of Federal funds, but can pledge their assets only when authority so to do has been specifically provided for by an act of Congress.

There is no act of Congress which authorized the Commercial National Bank to secure the deposits of Canal Zone funds made by the Secretary of War or which required the Secretary of War to exact security as a condition precedent to such deposits.

Section 45 of the National Bank Act is expressly limited to securing deposits of public money of the United States made by the Secretary of the Treasury in depositories designated by him pursuant to regulations of the Treasury

* It will be noted that in this particular, the instant case on its facts differs from case No. 5, *Woodring, et al.*, v. *Wardell*, since in the Wardell case it appears that the illegally pledged bonds were sold to the Hamilton National Bank and the proceeds credited to a new deposit account in that bank in the name of the Secretary of War Canal Zone funds. We are advised by the Panama Canal officials, in connection with the disposition of the bonds pledged by the Commercial National Bank to the Secretary of War, that of the bonds originally pledged by the bank on July 1, 1935, proceeds had been realized from the sale of the bank's bonds to the extent only of $154,855.78. On July 1, 1935, the Canal Zone officials accepted $220,000.00 face value bonds in exchange for bonds of an equivalent value and character which had matured as to payment. Thereafter, in 1936, bonds of the face value of $70,000.00, which had likewise matured, were accepted in exchange for bonds of equivalent value and character for payment. On May 1, 1937, the remainder of the bonds which had been originally pledged by the bank to secure Canal Zone deposits were sold by petitioners for the sum of $290,000.00. The instant case is therefore simply a suit to recover possession of property or its proceeds, alleged to be unlawfully held by petitioners.

and has no application to deposits of Canal Zone funds since they are not public money of the United States. Nor has there been any compliance with this section of the National Bank Act.

There is nothing in the Congressional Act of 1916 or in either the Circular of 1914 or 1923 issued from the Governor of the Canal Zone's office which authorized or required the taking of security upon deposits of Canal Zone funds. Such authority cannot be implied by considering the circulars and the statute together.

Inasmuch as the Canal Zone postal saving system was abolished in 1914, the Congressional Act of 1933 did not extend provisions of the United States postal savings system to the Canal Zone, and in any event there was no compliance with the terms of any provisions of the United States postal savings system relative to the securing of deposits.

Lack of specific statutory authority cannot be supplied by administrative practice no matter how consistent or how long continued.

II.

The pledge, being unauthorized, was void, and neither the pledgees, the Canal Zone nor the United States acquired any right or interest in the illegally pledged bonds or the proceeds thereof, which at all times remained the property of the bank.

Petitioners seek to justify retention of respondents' property on the ground that the United States and the Canal Zone are indispensable parties because petitioners hold the property as officials of the Government. To sustain this defense petitioners must show that their holding on behalf of the Government is lawful and this they have been unable to do. Therefore, the Court may order the petitioners, as individuals unlawfully in possession, to return respondents' property.

III.

The deposit of Canal Zone funds in the Commercial National Bank was legal, creating a debtor-creditor relationship and not one of trustee and cestui que trust, and in any event this question was not raised by the petitioners in their answer, in their brief in the District Court or on appeal. Nor was it urged as a basis for this Court's granting certiorari. Therefore, this question is not now before the Court.

IV.

The allowance of interest as awarded in the judgments below, while not assigned as error or argued below or in the petition for certiorari, was proper as a matter of law.

ARGUMENT AS TO THE CANAL ZONE DEPOSITS.

I.

National Banks Have No Power to Pledge Their Assets to Secure Deposits Unless Specifically Authorized by an Act of Congress.

The National Banking Act is a complete code in itself for the operation of national banks. The only powers which national banks have are the powers set forth in the Act or subsequent Acts of Congress.

The extent of the powers of national banks was before this Court in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 253, where the Court said:

> "National banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and *powers not conferred by Congress are denied.* For the Act under which national banks are organized constitutes a complete system for their government, *Cook County National Bank* v. *United States*, 107 U. S. 445, 448; *California Bank* v. *Kennedy*, 167 U. S. 362, 366; *First National Bank* v. *Missouri*, 263 U. S. 640." (Italics supplied.)

In spite of the clear statement by this Court in the Pottorff case, supra, that national banks have only such power as is expressly conferred by Acts of Congress, petitioners contend that there is an inherent power in national banks to pledge assets to secure deposits of public money of the United States and that money in the possession of a federal officer or agency is public money of the United States as to which said officer or agency in their discretion may legally require any national bank to pledge its assets to secure deposits of such money.

The basis for petitioners' contention is that Section 8 of the National Bank Act (12 U. S. C., sec. 24) confers such powers upon national banks as are incidental to doing a banking business and that Section 45 indicates a policy on the part of Congress looking to the securing of deposits of public money of the United States, which policy petitioners contend developed as a result of the Government's experiences with deposits of the public money in the Bank of the United States, state banks, and sub-treasuries, prior to the creation of national banks. Therefore, petitioners claim that Section 8, read in the light of Section 45, grants to national banks an implied power to pledge their assets to secure the deposit of all public money of the United States, regardless of whether or not the pledges are made under Section 45.

A similar argument was advanced in the Pottorff case, supra, and in rejecting it this Court at page 257 said:

> "The Railway insists that the Congress in providing that the Secretary of the Treasury might deposit public money in national banks upon receiving satisfactory security by 'the deposit of United States bonds or otherwise,' Act of June 3, 1864, c. 106, Sec. 45, 13 Stat. 113, assumed a general power in national banks to pledge their assets to secure deposits; and that the assumption indicates that it intended this power to be among the 'incidental' powers granted by Sec. 8.
>
> ". . . We may not import into Sec. 8 a meaning not derivable from the words of that section and inconsistent

with other provisions of the Act. Moreover, if the Railway's argument were sound it would have been unnecessary to amend Sec. 45 as was done by the Act of June 25, 1930. . . .

"This amendment indicated that Congress believed that the original Act *had not granted general power to pledge assets to secure deposits.* The fact that the amendment was made to Sec. 45 indicates that the power to pledge was granted only as an incident of the public officer's duty to demand a pledge." (Italics supplied.)

In *Marion* v. *Sneeden*, 291 U. S. 262, this Court made it clear that national banks had no general, incidental or implied power to pledge assets because of Sec. 45 of the Act or because of the federal statutes specifically authorizing the securing of particular deposits. At page 268 in its opinion this Court said:

"For the reasons stated in Texas & Pacific Ry. Co. v. Pottorff, decided this day [ante, page 245] we are of opinion that the Act of 1864 did not confer the power to pledge assets *to secure any public deposits* except those made under Sec. 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to *securing specific federal funds.*" (Italics supplied.)

In *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U.S. 559, this court again had before it the question of the power of national banks to give security for deposits. That case involved the securing of deposits of public funds of the state of Georgia and the Circuit Court of Appeals for the 5th Circuit ruled as a matter of federal law that national banks had, under the National Banking Act of 1864, implied power to pledge assets to secure public deposits. This court declined to follow the decision of the Court of Appeals on this point and at page 564 of its decision, stated:

"In Texas & Pacific Ry. Co. v. Pottorff, 291 U.S. 245, and Marion v. Sneeden, 291 U.S. 262, decided after the

entry of the judgment below, we held that a national bank had prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits *specifically provided for* by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and *that the judgment of the Circuit Court of Appeals must be reversed* unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes." (Italics supplied).

Petitioner seeks to escape the effect of the Pottorff and Sneeden cases by stating that these cases dealt with "the private aspect" of national banks. We submit that the Pottorff, Sneeden and Lewis cases deal with *the power* of national banks and that their language leaves no doubt that the power which petitioners contend exists by implication is totally lacking. These cases definitely establish the fact that national banks have no power to pledge assets to secure federal deposits unless there has been an Act of Congress specifically authorizing a pledge or requiring the officer making the deposit to exact a pledge.

Petitioners cite no authority to the contrary, but contend that as a result of losses suffered because of a failure to secure deposits in state banks, it became the settled policy of the Government to require security for all deposits of public money and that since the chief purpose of the National Bank Act was to provide a nation-wide system of banks to serve as Government depositories, it must be assumed that such banks have inherent power to pledge their assets to secure all deposits of money in which the Government has an interest.

This view ignores other purposes sought to be accomplished by the framers of the National Bank Act, and disregards the actual plan adopted touching the use of such banks as Government depositories. One of these objectives was to protect the citizens' money by raising banking

standards so that private depositors might have available under a federal law banks in which they could have confidence, and be assured of impartiality of treatment in the event of distress overtaking a bank. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 256.

The first of these ends was accomplished by providing that the Secretary of the Treasury might designate a National Bank as a depository for public money and require security for deposits of public money, it being left to his discretion what bank or banks should be so designated, the amount of deposits of public money to be permitted, and the extent and character of security to be taken.

The other of these two objectives was provided by the mandatory provision as to equality of treatment of all other depositors upon the happening of insolvency. Additional safeguards were provided, inspection and supervision of the bank by the Government, double liability of stockholders, and over all the securing against non-payment of the circulating bank notes authorized to be issued by the banks, by first a pledge of Government bonds and, second, a lien on all assets.

For this reason the National Bank Act, which is a complete code for the operation of such banks, does not grant any general power to pledge assets. The only pledges which the Act of 1864 itself permits or contemplates are pledges exacted and made to the Secretary of the Treasury to secure deposits of public money of the United States under his control, and if public money is deposited in a National bank designated as a Government depository, and insufficient security taken, the Government has no priority upon insolvency of the bank, but shares in its liquidation equally with other depositors. *Cook County National Bank* v. *United States*, 107 U. S. 445, 448.

There is no warrant in any of the historical facts recited by petitioners for a modification of the decisions of the Sneeden, Pottorff and Lewis cases, where this Court held specifically that national banks had no power to pledge their

assets to secure deposits, either public or private, unless expressly authorized so to do by appropriate Acts of Congress.

Deposits Made by Petitioners Were Not Public Moneys of the United States as the Term Is Used in Section 45 of the National Bank Act.

Section 45 of the National Bank Act (R. S. 5153, Sec. 90, Title 12, U. S. C.) is the only section of that Act which confers upon national banks any power to pledge assets to secure deposits. This section is set out in full in the appendix hereto at pages 4 to 5, and an examination of its provisions indicates that it is specifically limited to deposits of public moneys of the United States made by the Secretary of the Treasury in national banks designated by the Secretary as depositories of public money. Since the application of the section is limited to "public money," it is necessary to interpret that phrase and to consider the character of deposits here involved.

It is obvious that the various congressional enactments dealing with the public moneys of the United States can not be considered as isolated independent statutes complete in themselves, but must be read together as part of a general congressional plan looking to the proper receipt and custody of such moneys.

An examination of the various statutes dealing with the revenues of the United States indicates that the general plan of Congress was to have all money of the United States paid into the Treasury, subject to the control of the Secretary of the Treasury, and to the various safeguards which relate to money under the control of the Secretary of the Treasury and the Treasurer.

Money is covered into the Treasury under Section 147, Title 31, U. S. C.; R. S. 305 which provides:

> "The Treasurer shall receive and keep the moneys of the United States and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned

> in the General Accounting Office, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid."

In addition to this section there are many other specific provisions by which money of the United States is directed to be paid into the Treasury. Thus, Congress has provided that "the gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable * * *." (Sec. 484, Title 31, U.S.C.; R. S. 3617)

Similarly, the net proceeds from the sale of public property of any kind is required to be paid into the Treasury. (see section 487 of Title 31, U.S.C.; R. S. 3618 and section 489 of Title 31 U. S. C.)

Every disbursing officer having any public money entrusted to him for distribution must deposit same with the Treasurer or with one of the depositories of the United States. (Sec. 492, Title 31, U. S. C.; R. S. 3620.) Also every person who shall have moneys of the United States in his hands or possession, not required for current expenditure, shall pay the same to the Treasurer or some public depository of the United States, within 30 days of their receipt of same. (Section 495, Title 31, U. S. C.; R. S. 3621.)

After the money has been covered into the Treasury, it is subject to the control of the Secretary of the Treasury, or the Treasurer of the United States. The Secretary of the Treasury may either retain the money in the Treasury, or pursuant to Section 45, of the National Bank Act (Sec. 90, Title 12, U.S.C.) he may place it with National banks designated as depositaries, and require security therefor. The Secretary also may transfer the moneys from one deposi-

tary to another or from a depositary to the Treasury. (See section 522, Title 31, U. S. C.; R. S. 3640.)

All money paid into the Treasury is subject to the draft of the Treasurer (Sec. 526, Title 31, U. S. C.; R. S. 3644) and all public moneys paid into any depositary are also subject to the Treasurer's draft. (Sec. 474, Title 31, U. S. C.; R. S. 3593.)

Having provided a general plan for placing the money of the United States in the Treasury or a depositary designed by the Secretary of the Treasury and subject to the control of the Secretary of the Treasury or the Treasurer, Congress has placed definite restrictions and requirements upon the Secretary of the Treasury and the Treasurer to protect the public moneys under their control. It is provided under Section 147 of Title 31, U. S. C. (R. S. 305) that once money has been covered into the Treasury it can be disbursed only upon warrants drawn by the Secretary of the Treasury and countersigned in the General Accounting Office.

The Secretary of the Treasury is required annually on the 1st day of the regular session of Congress to lay before that body an accurate statement of receipts and expenditures during the last preceding fiscal year of all public moneys (Sec. 264, Title 5, U.S.C.). The Treasurer is required to render his account to the General Accounting Office quarterly or oftener if required. (Sec. 147, Title 31, U.S.C.; R. S. 305.)

This court had occasion to examine the various statutes relating to public money in *Coudert* v. *United States*, 175 U.S. 178, 182, and in that case public money as used in these statutes was defined as follows:

> "From these provisions it will be seen that the public moneys of the United States are the revenues of the United States from all sources, *and the gross amount received must first be paid into the Treasury.* (Secs. 3617 and 3618.) They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law. (Secs. 3593 and 3642. See also Sec. 3210.)" (Italics supplied).

Having established a definite plan for the safe keeping of public money, Congress has provided in the Criminal Code penalties which are designed to insure the carrying out of the plan. It will be noted that Sections 173, 174, 175, 177, 178, 179, 180 and 181 of Title 18 U.S.C. are intended to prevent persons having public money in their custody making unlawful deposits or use of such money. Section 182 supplements these sections, by making the person or bank who receives an unauthorized deposit of public money guilty of embezzlement, just as the person making the deposit is made guilty of embezzlement under the previous sections of this Title.

From the foregoing resume of the Congressional enactments dealing with public money of the United States, it is readily seen that Section 45 of the National Bank Act is but a part of the general statutory plan. The term "public money" is used in Section 45 in the same sense as in these other statutes and accordingly the money which may be secured under Section 45 is limited to public money under the control of the Secretary of the Treasury. Money in which the government may have an ultimate interest but which is not under the control of the Secretary of the Treasury is outside of the purview of Section 45.

If the petitioners' contentions are sound and the money received by them in the ordinary course of their activities is to be considered as "public money" of the United States such money would automatically become subject to the control of the Treasury Department and subject to all the restrictions and safeguards placed upon such moneys. An examination of the facts set forth in petitioners' answer clearly indicates that this was not the case and that the deposits cannot possibly be considered as public money within the meaning of that phrase as used in Section 45 of the National Bank Act and the related statutes dealing with the public moneys of the United States.

The money deposited by the Canal Zone officials was composed of money received by the postal service of the Canal Zone consisted of deposit money funds and money order funds. (R. 84) It is admitted in the answer of the Canal Zone officials that "The so-called Panama Canal funds are not public funds and are not part of the revenue of the United States; that they are not subject to the control of the Secretary of the Treasury in his official capacity as such Secretary in respect of public moneys of the United States." (R. 90)

In view of these admissions, as well as the other facts of record, it is obvious that the funds of the Canal Zone deposited in the Commercial National Bank had never been covered into the Treasury, and were not in any way subject to the control of the Secretary of the Treasury or the Treasurer of the United States, and therefore it is quite apparent that these deposits of Canal Zone funds cannot properly be considered as being "public money of the United States" within the meaning of Sec. 45 of the National Bank Act.

There Has Been no Compliance With the Provisions of Sec. 45 of the National Bank Act.

It was held by the Court of Appeals in *O'Connor* v. *Rhodes*, 79 Fed. (2d) 146, 150, that Section 45 of the National Bank Act (R. S. 5153) was personal to the Secretary of the Treasury and that to come within its requirements a pledge must meet the following requirements: (a) the deposit for which the pledge was given as security must be of public moneys of the United States; (b) the bank in which the deposits are made must have been designated as a depositary of public moneys by the Secretary of the Treasury; (c) the deposit must have been made by direction of the Secretary of the Treasury, and subject to his check or control; (d) the pledge must have been made to the Secretary of the Treasury.

While the Court of Appeals' construction of Sec. 45 was urged in the petition filed on behalf of Merchant Fleet Corporation and of the Attorney General as successor to the Alien Property Custodian for a Writ of Certiorari as being erroneous, this Court in the Rhodes case, 296 U. S. 568, granted the petitions for the writ *limited* to the question of the right of the respondent Rhodes to bring the suit without prior demand upon, and refusal by, the Comptroller of the Currency or the receiver, or both.

We believe that a reading of Section 45 clearly indicates the correctness of the construction placed upon it by the Court of Appeals both in the Rhodes case and in the instant case.

Since, as we have shown, none of the deposits involved consisted of public money of the United States, it is clear that none of the pledges was authorized by Sec. 45 of the National Bank Act. It is also apparent that Sec. 45 applies only to banks designated as depositaries of public moneys by the Secretary of the Treasury, and in the instant case it is admitted (see petitioners' brief Page 62, Note 32, and Page 67) that the Commercial National Bank was not so designated. (See also R. 43, 90).

It is clear that the foregoing primary requirements of the Section have not been met, and consequently there would be no basis for contending that the pledges were authorized by this section even if there had been a full compliance with the other provisions of the section, but an examination of the answer of the petitioners indicates that no single requirement of Sec. 45 has been met.

The contract between the Commercial National Bank and the Secretary of War pursuant to which these deposits and pledges were made, (Ex. C-1 R. 17) clearly shows that the deposit, and the pledges made pursuant thereto, were subject to the control of the Secretary of War and his subordinate officers, and in no way subject to the control of the Secretary of the Treasury or any official of the Treasury Department. The answer of the Canal Zone officials in-

dicates that the deposits were made by the Secretary of War, (R. 83), that the contract was between the bank and the Secretary of War, (R. 83), that the pledge and delivery of the bonds was to an official of the Canal Zone, (R. 83).

The appendix to petitioners' brief at pages 46-58 sets forth the correspondence preceding the pledge of assets here in question and petitioners contend that the correspondence between the Secretary of War and the Secretary of the Treasury constitutes substantial compliance with Section 45 of the National Bank Act. However, examination of the various letters indicates that the officials of the Canal Zone and the War Department did not consider the Canal Zone's funds as embraced by the provisions of the various public money statutes of the United States,* and no effort at compliance with Section 45 of the National Bank Act was intended or made.

A letter of September 19, 1908, by W. W. Warwick, Examiner of Accounts of the Canal Zone, to Lt. Col. George W. Goethals, Chairman of the Isthmian Canal Commission (set forth pp. 46-51 of appendix to petitioners' brief) states:

> "As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositories of public money do not apply."

Similarly a letter dated October 21, 1908, from Chairman Goethals to the Secretary of War (set forth pages 51-52 of the appendix to the petitioners' brief) states:

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* This conclusion of the Canal Zone and War Department officials, was based upon an opinion of Comptrolier of the Treasury Tracewell given July 26, 1904, reported in 11 Decisions of the Comptroller of the Treasury at page 36 to the Chairman of the Isthmian Canal Commission, wherein the Comptroller, relying upon *Downes* v. *Bidwell*, 182 U. S. 244 and *Fleming* v. *Page*, 9 How. 603, 617, held that the Canal Zone was not covered by general Federal statutes, and concluded that "said Zone is not a part of the United States within the full meaning of the Constitution and laws of the Country."

"As noted in Mr. Warwick's letter, the monies of the Zone are not monies of the United States, so that the laws regarding the designation of depositories of public monies do not apply."

The correspondence with the Secretary of the Treasury was obviously simply for the purpose of obtaining the advice of the Secretary and in no sense was intended as any sort of compliance with Section 45, since the officials did not believe that Section 45 had any application to Canal Zone funds.

In view of these facts, it is quite clear that none of the requirements of Section 45 was intended to be met, and in fact none was met.

Pledge Not Authorized by the Congressional Act of 1916.

As we have shown under the decisions of this court in the Pottorff, Sneeden and Lewis cases, supra, in order to be valid, there must be a specific federal statute authorizing a national bank to make a pledge of its assets to secure deposits, or requiring a depositing officer to exact a pledge as a condition of the deposit. There is no statute expressly requiring the Secretary of War or any other officer of the Canal Zone to deposit Canal Zone funds in national banks and to exact security therefor, and there is no statute which grants to national banks the power to pledge assets to secure deposits of Canal Zone funds.

To meet this situation petitioners rely upon the Congressional enactment of 1916 which they contend ratified a regulation issued from the office of the Governor of the Canal Zone in 1914, which regulation it is claimed in effect ratified the contract entered into by the Secretary of War and the Commercial National Bank in 1910.

Petitioners also urge that because the deposits consisted in part of funds derived from the sale of Canal Zone de-

posit money orders and because Congress provided by an enactment in 1933 that the postal service of the Canal Zone should be governed by such laws, rules or regulations of the United States postal service as were applicable, authority existed for the pledge at least as to that portion of the deposits. We shall consider this latter contention hereafter.

By the Act of June 28, 1902, c. 1302, 32 Stat. 481 (Spooner Act), Congress authorized the President to acquire for the United States from the Republic of Colombia, perpetual control of a strip of land not less than six miles wide, extending from the Caribbean Sea to the Pacific Ocean. Under Sec. 7 of the Act the Isthmian Canal Commission was created in order to "enable the President to construct the canal and works appurtenant thereto".

The Act of April 28, 1904, c. 1758, 33 Stat. 429, authorized the President to take possession of the Canal Zone, and under Sec. 2 it was provided that until the expiration of the 58th Congress the power to make all rules and regulations necessary for the government of the Canal Zone should be vested in such person or persons and should be exercised in such manner as the President might direct.

On May 9, 1904, the President wrote to the Secretary of War stating that inasmuch as it was impractical for him personally to supervise and govern the Canal Zone, he was delegating the power to make all rules and regulations for the government of the Zone to the Isthmian Canal Commission, to be exercised under the supervision and direction of the Secretary of War. This letter is set out in full in the appendix, pp. 16-18, and delegates the power of making rules and regulations for the Canal Zone to the Isthmian Canal Commission. It gives the Secretary of War general supervisory powers over the acts of that Commission, but it does not give the Secretary of War any authority to adopt any rules or regulations for the Canal Zone except through the Isthmian Canal Commission.

A postal service was inaugurated for the Canal Zone on September 2, 1904, and a postal savings system for the Zone was established in 1914.* Between these two dates, on January 17, 1909, a contract was entered into between the Secretary of War and the Commercial National Bank providing for the deposit of Canal Zone funds in the Bank and a pledge by the bank to the Secretary of War to secure said deposits. Pursuant to this contract of 1909, as amended by an agreement of May 11, 1910 (Ex. C-1. R. 17-21) deposits of Canal Zone funds were made in the Bank and the pledge which is the subject of the instant suit was made to secure such deposits.

By 1912 there was a great deal of doubt as to the legality of various acts and regulations by which the Canal Zone had been governed. Accordingly, in 1912, Congress, by Sec. 2 of the Act of August 24, 1912, 37 Stat. 560, provided:

> "That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal, are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

While the section of the Act quoted above ratified and confirmed "all laws, orders, regulations and ordinances" in effect in the Canal Zone by authority of the President, *no claim is made by petitioners that at the time this Act was passed there was any law, order, regulation or ordinance authorizing or requiring the security of Canal Zone funds.* The Act further empowered the President to discontinue the Isthmian Canal Commission when he saw fit. It will be noted that this Act does not and could not ratify future laws, orders, regulations of ordinances of the Canal

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* The postal system of the Canal Zone is discussed in detail on pages 28 to 33 post.

Zone, though it does give legality to all such orders, regulations, etc., that had been adopted prior to 1912.

By Executive Order of January 27, 1914 (Appendix, pp. 23-24), the President terminated the services of the Isthmian Canal Commission and set up a permanent organization for the government of the Canal Zone.

On April 1, 1914, Circular No. 660-2 was issued from the office of the Governor of the Canal Zone which, while not in the record, is set forth in the appendix of petitioners' brief at page 25. Paragraph 3 of this circular provides*:

> "3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal."

As we have indicated, petitioners contend that the language quoted is a ratification of the contract entered into between the Secretary of War and the Commercial National Bank in 1910, and when considered with the provisions of

*There is nothing in the Record to show that this Circular was ever approved by the President of the United States, as required by the Executive Order of January 27, 1914, which is the only authority for the issuance of such Circulars, as admitted in footnote 19, page 27, of petitioners' brief, in the Wardell case, No. 5.

the Congressional Act of August 21, 1916, must be considered as specific authority for the pledge.

In the Act of August 21, 1916, c. 371, 39 Stat., 527, 528, Congress provided by Sections 6 and 7 . . .

> "Sec. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.
>
> "Sec. 7. That the interest received from the Canal Zone money order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service."

The vice of this argument lies both in the interpretation given to the circular itself and of the Act of 1916. The circular related to contracts that had been entered into by the Secretary of War under an assumption that National banks had the right to secure deposits such as those relating to Canal Zone funds, and is no more than a direction to officials to deposit such funds in banks with which such contracts were had. *It cannot be construed of itself to be a requirement for the taking of security.* As stated, it simply referred to an existing condition wrongfully assumed to be a warranted one and does not bring into existence any requirement, whether warrantable or not, that deposits of Canal Zone funds must be secured.

While the Governor's Circular, as we view it, does not specifically provide for the exaction of security, respondents submit that even though the Governor had enacted an express regulation which required depository banks to pledge assets to secure Canal Zone deposits, such a regulation, standing alone, would have been ineffective because Congress could only delegate to the President or

the Governor power to deal with questions local to the Panama Canal. It is obvious that Congress could not and did not delegate authority, to either the President, the Secretary of War or the Governor of the Canal Zone, to enlarge the powers of National banks of the United States to pledge their assets. If such purported authority had been given, it would have been an unconstitutional delegation of legislative power.

The Act of 1916 deals solely with the payment of interest on deposit money orders issued "in accordance with the rules and regulations" established by the President, and is not as broad as the Act of August 24, 1912, supra, which covered all laws, orders, regulations and ordinances. This Act does not undertake by affirmation or otherwise to require the giving of security in connection with deposit of Canal Zone funds. By its terms it relates only to the disposition of interest paid on account of such deposits. The contention that the circular of April 1, 1914, plus the subsequent Act of Congress of August, 1916, is such a specific statutory requirement for the taking of security for such deposits as to avoid the National Banking Law forbidding preferences and requiring ratable distribution of the bank's assets upon insolvency, is, in our judgment, without warrant.

Indeed, it is quite clear that the pledge was exacted by the Secretary of War upon the erroneous assumption that the bank had the power to make it and petitioners' entire argument on this point is simply an afterthought seeking to find a legal basis for this erroneous assumption.

Petitioners also cite what is known as Governor's Circular No. 660-61 of April 5, 1923, paragraph 4 of which provides:

> "Postal savings, money order, clubhouse and other trust and security funds received shall be remitted to depositors in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor. Tolls and other

revenues of the United States shall be deposited to the credit of the Treasurer of the United States in accordance with laws and regulations prescribed therefor, and any funds due the Panama Railroad Company in excess of currency transferred to the Paymaster shall be deposited to the credit of the Panama Railroad Company in local depositories."

This circular like the one of 1914 does not attempt to authorize the securing of Canal Zone postal savings or money order funds. It was adopted some 10 years after the Act of 1912, and some six years after the Act of 1916, and consequently cannot be considered to have been ratified by those Acts of Congress. Nor is there any Act of Congress subsequent to the adoption of this circular which ratifies regulations of the Governor of the Canal Zone.

Obviously, neither the circular of 1914 nor the one of 1923 meets the requirements of the Sneeden, Pottorff and Lewis cases which expressly hold that for a pledge to be legal there must be a specific Act of Congress either authorizing the bank to make the pledge or requiring the officer exacting the pledge to take security.

Petitioners rely upon *Berger* v. *Chase National Bank* (C.C.A. 2nd Circuit) decided July 24, 1939. In that case it appeared Congress had authorized the Philippine Commission to enact laws respecting the government of the Philippine Islands, which powers Congress subsequently vested in the Philippine legislatures. The Philippine Commission passed an Act permitting the Secretary of War of the United States to designate banking institutions in the United States as depositaries of the Government of the Philippine Islands, and this Act *specifically* required the Secretary of War to exact bonds from said depositary banks as security for the repayment of the Philippine deposits therein made.

This enactment remained in full force and effect until 1916, when the third Philippine Legislature adopted a similar provision of designation of depositaries, and the re-

quirement for the exaction of security for the repayment of deposits made thereunder. This provision was subsequently included in the Philippine Administrative Code of 1917, Section 625.

Further it appeared that under the so-called Autonomy Act of 1916, Section 6, Congress provided that "the laws in force in the Philippines on October 29, 1916, shall continue in force and effect, except as altered, amended, or modified by this chapter, until altered, amended or repealed by the legislative authority provided by this chapter or by acts of Congress of the United States."

The court held that by virtue of the Congressional Acts power was granted to the Philippine Commission and legislatures to make laws touching the government of the Philippine Islands, and the subsequent action of the Philippine Commission and Legislatures touching deposits of Philippine moneys, constituted authority to banks in the United States to pledge their assets to secure such deposits, and that if the court had entertained any doubt as to the correctness of such conclusion it was removed by the Autonomy Act of 1916, passed by Congress.

We think the decision in the Berger case is erroneous, since there was no Act of the Congress of the United States which specifically authorized or required the securing of the deposits of the government of the Philippine Islands, and Congress could not delegate to the Philippine Legislature authority to enlarge the powers of national banks in the United States, so as to enable them to pledge their assets to secure deposits of the Philippine government.

Further, we think the court in error in its conclusion that the Autonomy Act of 1916 validated the pledge. The Act of 1916 continued in force valid laws in effect in the Philippine Islands, and this court has held that Section 6 of the 1916 Act must be confined to laws local to the Philippines. *Posadas* v. *National City Bank*, 296 U. S. 497, 501.

But whether we are right in our judgment as to the Berger case having been wrongfully decided, we submit, in view of its facts, that it cannot be considered as determining the question here at issue.

In the instant case, unlike the Berger case, there is neither a *specific regulation authorizing or requiring the exaction of security*, nor is there an Act of Congress in existence which may be said to *ratify* any such specific regulation.

The Pledge Not Authorized by the Act of 1933.

As stated petitioners contend that, as to that part of the deposits which consisted of deposit money order funds, authority for the pledge may be found in the United States Postal laws which were extended to the Canal Zone by the Congressional enactment of February 16, 1933. Hence it is necessary to examine the U. S. postal laws to determine what application they have to deposits of Canal Zone deposit money order funds.

(a) United States Postal Laws prior to enactment of Postal Savings Act.

The original U. S. Postal Act had no provision for a postal savings system. A postal savings system was not established until the year 1910. Prior to that date, the law relative to securing postal revenues provided that such funds should be paid into the Treasury of the United States, or a depositary designated by the Secretary of the Treasury. (See 5 U. S. C. sec. 380.) The only way such deposits could be secured was under section 45 of the National Bank Act (Sec. 90 of Title 12, U. S. C., sec. 5153 of the Revised Statutes).

We have already shown that the pledges were not made pursuant to section 45, and hence such pledge of assets could not be upheld as legal, even though the funds had in fact been United States postal funds. Of necessity, even though

these particular laws be considered as applicable in all particulars to the Canal Zone, they would give no validity to a pledge of assets to secure deposits of Canal Zone postal funds, in a bank not a designated government depositary.

(b) United States Postal Savings Act.

By Act of June 25, 1910, a postal savings system was created in the United States. Sec. 1 of c. 386 of this Act of 1910 (Sec. 759, Title 39, U.S.C.) requires the Board of Trustees of the Postal Savings System to deposit United States postal savings funds in banks and to take security therefor.

It is urged by petitioners that this section has been incorporated into the postal laws of the Canal Zone and is therefore authority for the pledge. This section is set out in full at pages 13-15 of the appendix. However, part of it is of sufficient importance to be quoted here. Thus it is provided:

> **"Postal Savings funds received under the provisions of this chapter shall be deposited in solvent banks."**
>
> "The Board of trustees shall take from such banks such security in public bonds or other securities, authorized by Act of Congress or supported by the taxing power, as the board may prescribe, approve, and deem sufficient and necessary to insure the safety and prompt payment of such deposits on demand."

It is clear from the quoted provisions that Sec. 759 applies only to postal savings funds in the United States and authorizes the Board of Trustees of the U. S. Postal Savings System to exact security upon making deposits of U. S. postal savings funds. Even if this section had been incorporated into the Canal Zone postal laws, it would apply only to that portion of the deposits here in question made up of postal savings funds. Of the deposit in the Commercial National Bank at the time of its closing only those funds composed of deposit money order funds are claimed to be comparable to postal savings funds, but we need not stress

this, as in our judgment these postal savings laws were not in fact incorporated into the Canal Zone laws.

The only postal law in the United States which requires the securing of any postal deposits is Section 759 of Title 39 U. S. C. discussed above which requires the Board of Trustees of the United States Postal Savings system to exact security upon depositing United States postal savings funds. This Act was passed June 25, 1910, and with this date in mind we turn to an examination of the Canal Zone Postal System as it relates to the Congressional Act of 1933.

By order of June 24, 1904, from the Secretary of War to the Chairman of the Isthmian Canal Commission (see appendix pp. 18-19) a temporary postal service was directed to be set up by the governor, but the order goes on to provide that the plan shall be submitted to the Chairman of the Isthmian Canal Commission for such action as the Commission shall approve.

On September 2, 1904, the Isthmian Canal Commission enacted Act No. 8 (appendix pp. 19-20) which provides:

> "The Postal Service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission."

This order of the Isthmian Canal Commission, while incorporating United States Postal Service laws then in force, could not and did not purport to incorporate future Acts of Congress. Since it was passed nearly six years before the Postal Savings Act of the United States was enacted by Congress, and seven years before there was a Postal Savings System in the Canal Zone, manifestly Sec. 759 of Title 39 U.S.C. (U.S. Postal Savings Act) was not by this Act of the Commission made a part of the Canal Zone postal laws.

See *In re Heath*, 144 U.S. 92, 94; *Kendall* v. *U.S.*, 12 Pet. 524, 624; *Munoz* v. *Porto Rico Ry. L. & P. Co.*, 83 F. (2d) 262, 266.

By Executive Order of September 8, 1911, a year after the U. S. Postal Savings system was established, a postal savings system was provided for the Canal Zone. The full text of this order is found in the appendix at pages 20-21. Examination of it indicates that while it follows the general pattern of the U. S. Postal Savings Act and provides for a board of trustees, consisting of the Collector of Revenues for the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal, it does not require or authorize the taking of security for Canal Zone postal savings funds, nor does it incorporate any United States Postal savings laws, but is complete in itself.

In 1914 the Postal Savings System of the Canal Zone was terminated by an Executive Order of September 5, which provides:

> "By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:
>
> "Section 1. The Executive Order of September 8 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed; Provided, That accounts opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.
>
> "Section 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.
>
> "Section 3. This order shall take effect from and after October 1, 1914."

Petitioners' chief reliance is predicated upon the Congressional Act of February 16, 1933 (47 Stat. 812, 48 U.S.C. sec 1323a), which simply extends such laws, rules and regulations of the United States Postal Service as are

applicable to the Canal Zone. The act was passed 23 years after the execution of the contract for security, 9 years after the repeal of the order creating a postal savings system for the Canal Zone, and only twelve days before the Commercial National Bank suspended. It provides:

> "The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone. . . ."

Section 759 of Title 39 U.S.C. which authorizes the Board of Trustees of the United States Postal Savings System to exact security upon deposit of United States postal savings funds. This section is an integral part of the United States Postal Savings Act, which, while part of the Postal Service of the United States, is a complete unit in itself. Inasmuch as the Executive Order creating the Postal Savings System for the Canal Zone had been repealed some nine years prior to the passage of the Act of February 16, 1933, so that the Postal Savings Act of the United States as a unit was no longer applicable to the Canal Zone, it seems obvious that nothing in the Act of 1933 can be construed as extending this one section of the United States Postal Savings System to the Canal Zone. Nor was the section itself applicable to conditions existing in the Canal Zone, since there was no longer a Postal Savings System in the Canal Zone, nor any Board of Trustees to function as required by this section.

Even if it be assumed that by the Act of 1933 Congress did extend Section 759 of Title 39 U.S.C. to the Canal Zone, it thereby only authorized a Board of Trustees of the Canal Zone Postal Savings System to exact security upon the deposit of postal savings funds in national banks, and it further authorized such trustees to exact only "such security in public bonds or other securities authorized by Act of Congress or supported by the taxing power." There has been no compliance with either of these requirements.

There is nothing in the record to show that the Board of Trustees of the Canal Zone, as such, had anything to do with the pledge in question, nor is there any evidence or allegation that any one of the officers who by virtue of his respective office constituted the Board of Trustees of the Canal Zone Postal Savings System during its existence took any action in connection with the pledge before or after the Canal Zone Postal Savings System was abolished. The security exacted for the deposit here in question is set forth in exhibit C-2 on page 21 of the Record, and clearly does not constitute the character of security which Section 759 of Title 39 U.S.C. requires to be taken to secure deposits of United States postal savings funds.

The record is clear that there was no attempt to comply with Section 759 of Title 39 U.S.C. and it would seem clear that this argument of petitioners' is merely an afterthought not warranted by the facts.

It is manifest that these petitioners have failed to point out any Act of Congress which either authorizes the Secretary of War to exact security from a non-designated and unauthorized depository for the deposit of Canal Zone postal funds, or which requires such unauthorized depository to give security to secure postal funds of the Canal Zone. There is nothing in the postal laws of the United States, or of the Canal Zone, which purports to give legality to a pledge such as is now before this Court, and it follows of necessity that this pledge is illegal and void under the principles of law laid down by this Court in the Pottorff, Sneeden and Lewis cases, and followed by the Court below in both *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 150, and the instant case.

Administrative Practice Cannot Supply Lack of Specific Statutory Authority So As to Legalize the Pledge.

Having failed to point to any specific authorization for the pledge here in question, petitioners next rely upon what they denote as "the consistent administrative practice". This argument of petitioners states that because officials of the government had assumed that national banks had an inherent power to pledge their assets to secure deposits of public money of the United States, such power must be considered as in fact existing. In view of the decisions of this Court previously referred to, it is quite clear that national banks have no such power, and manifestly administrative practice—no matter how consistent—cannot create a power where none exists.

In *City of Marion* v. *Sneeden*, 291 U. S. 262, at 269, the Court said:

> "In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

In view of Sec. 194 of Title 12 of the U. S. Code, which requires a ratable distribution of an insolvent national bank's assets among its creditors, and of Sec. 91 of Title 12 of the U. S. Code, which prohibits and declares void preferential transfers of a bank's assets in contemplation of insolvency, it cannot be argued that any custom or usage could legalize this pledge.

On this point this Court said in *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255:

> "To permit the pledge would be inconsistent with many provisions of the National Bank Act which are designed

to ensure, in case of disaster, uniformity in the treatment of depositors and a ratable distribution of assets. Compare Davis v. Elmira Savings Bank, 161 U. S. 275, 290."

This question of custom and usage has been repeatedly asserted as a defense and uniformly overruled in various circuit court opinions, as to which this Court has consistently denied certiorari.

La Parr v. *City of Rockford*, 100 F. (2d) 564, 567, C. C. A. 7th, cert. denied No. 721, U. S. S. Ct. May 1, 1939.
Leonard v. *Gage*, 94 F. (2d) 19, 26, C. C. A. 4th Cir., certiorari denied, 303 U. S. 653;
City of Fort Worth v. *McCamey*, 93 F. (2d) 964, 968, C. C. A. 5th Cir., certiorari denied, 304 U. S. 571;
City of Chicago v. *Joseph*, 95 F. (2d) 444, 446, C. C. A. 7th Cir., certiorari denied, 304 U. S. 578;
Hood v. *Hardesty*, 94 F. (2d) 26, 29, C. C. A. 4th Cir., certiorari denied, 303 U. S. 661;
Granzow v. *Village of Lyons*, 89 F. (2d) 83, 85, C. C. A. 7th Cir.
O'Connor v. *Rhodes*, 79 F. (2d) 146, 151 (App. D. C.).

Indeed the main document relied upon by petitioners as establishing the "consistent administrative practice," set forth no pages 42-45 of their brief, is an extract from a memorandum which accompanied a bill which the Treasury Department sought to have enacted as an amendment to Section 45 of the National Bank Act (Sec. 90, Title 12, U. S. C.). The bill was never enacted by Congress and the memorandum would seem to be of little value.

However, it should be noted that while the memorandum indicates that the Treasury Department may have assumed that national banks had the power to pledge assets to secure deposits of federal funds, it also definitely shows that as a result of the Pottorff and Sneeden cases the Treasury officials realized that their assumption was erroneous and that no such power in fact existed. Thus part of the memo-

randum (p. 43 of petitioners' brief), in referring to the Sneeden and Pottorff cases, states:

> "The court took the position that national banks have no implied power to give security for deposits of public money notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency."

Since these decisions there is no longer any question of the absence of such power and consequently there is no basis for looking to administrative construction as a method of construing an ambiguous statute. No ambiguity exists, unless this Court's decisions are to be ignored, nor do any of the cases cited by petitioners support the proposition that where a power has been held not to exist, administrative practice—no matter how long continued—can create such power.

II.

Neither the United States Nor the Panama Canal is an Indispensable Party to this Action.

The attempted pledge of the bank's assets to secure Canal Zone deposits in the absence of express statutory authority was void, and no title to said assets passed thereby to the intended pledgee.

It has been demonstrated under Point I that (1) national banks derive their powers from Congress and powers not granted are denied; (2) that authority to pledge their assets must be by specific act of Congress; (3) that no act of Congress authorized the bank to effect the pledge or required the depositing officer to exact it; (4) that no general or incidental power is vested in national banks to pledge their assets to secure government or other deposits, and that each Act of Congress authorizing or requiring such pledges has by its terms been expressly limited to the deposits therein described.

It is now definitely settled that unauthorized pledges by national banks are illegal and void because *ultra vires*, and that the intended pledgees acquired no title or right in the securities, which always remain assets of the bank. These principles are clearly enunciated in the following cases:

Central Transportation Company v. *Pullman's Palace Car Company*, 139 U. S. 24;
Texas & Pacific Ry. Co. v. *Pottorff*, 291 U. S. 245;
LaParr v. *City of Rockford* (C. C. A. 7), 100 F. (2d) 564, 569, *certiorari* denied No. 721, U. S. S. Ct., May 1, 1939;
Hood v. *Hardesty* (C. C. A. 4), 94 F. (2d) 26, 29, *certiorari* denied 303 U. S. 661;
Redfield Independent School District v. *Schneizer* (C. C. A. 8), 94 F. (2d) 257, 258;
City of Ft. Worth v. *McCamey* (C. C. A. 5), 93 F. (2d) 964, 967, *certiorari* denied 304 U. S. 571;
Queenan v. *Mays* (C. C. A. 10), 90 F. (2d) 525, 533, *certiorari* denied 302 U. S. 724;
Leonard v. *Gage* (C. C. A. 4), 94 F. (2d) 19, 23, 24, *certiorari* denied 303 U. S. 653;
City of Chicago v. *Joseph* (C. C. A. 7), 95 F. (2d) 444, 446, 447, *certiorari* denied 304 U. S. 578;
The Illinois Central Ry. Co. v. *Rawlings* (C. C. A. 5), 66 F. (2d) 146, 149, *certiorari* denied 291 U. S. 668;
Baltimore and Ohio Ry. Co. v. *Smith* (C. C. A. 3), 56 F (2d) 799, 801.
Downey v. *City of Yonkers* (C. C. A. 2) decided Aug. 3, 1939.

This Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, *supra*, on these questions said at page 260:

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Nat. Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24."

The Pottorff-case related to the powers of the national bank, but on the principles of law involved, this Court cited with approval the case of *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, which laid down at pages 59 and 60 the fundamental principle here contended for by respondent that:

> "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Italics supplied.)

Respondent contends that the denial of *certiorari* by this Court in the above enumerated cases arising in the 4th, 5th, 7th and 10th circuits clearly indicates that this Court has definitely approved the fundamental principle that pledges *ultra vires* national banks are wholly void and no right and title thereby passes to the intended pledgee.

The rule is well illustrated in the decision of *Illinois Central R. R. Co.* v. *Rawlings*, (C.C.A. 5) 66 F. (2d) 146 *certiorari* denied 291 U. S. 668, wherein that Court, considering the nature of an *ultra vires* pledge, stated at page 149:

> "* * * By the *Pottorff* Case it was meant to decide, and it was decided, that such an arrangement, looking to creating, in the event of insolvency, preferences among general depositors, was fundamentally invalid; that no rights could be predicated on it, or on the physical possession of the pledged bonds acquired by virtue of it. * * *"

So, in *Baltimore and Ohio Ry. Co.* v. *Smith, supra,* in referring to an attempted pledge of a national bank's assets to secure a deposit, the Court said, at page 802:

> "Such a contract is not only voidable but wholly void and of no legal effect."

The Circuit Court of Appeals for the 7th Circuit reached the same conclusion in *City of Chicago* v. *Joseph, supra,* wherein it was stated at page 446:

> "If we are permitted to accept the averment that the securities were those of the bank and that defendant was so advised, the pledge was invalid, and, as we said, in the last mentioned case, 'being void the transaction could not be confirmed, ratified, enforced or rendered enforceable by the application of any doctrine of estoppel or otherwise. (Citing cases) This is because, not merely that the bank ought not to make the contract, but that it could not legally make it. Ratification is impossible if there is no power to contract. (Citing cases) And knowledge of the lack of existence of authority is conclusively presumed.'"

In *LaParr* v. *City of Rockford, supra,* where it was shown no statutory authority existed for the pledge, the Court at page 567, held:

> "It follows, therefore, that the pledge of the assets was illegal. * * * All of the parties assumed that the pledge was valid. Their assumption was incorrect, but that it was erroneous was not authoritatively established by the Supreme Court until after the payment of the deposit to the city. Immaterial, however, is the motive that inspired the parties, for, under the law, the pledge was invalid, and no act of the bank, the receiver or the comptroller could validate it."

Respondent contends that the foregoing authorities establish that the pledges made in the instant case were void

because *ultra vires* the powers of the bank, since no Act of Congress authorized or required the pledge. Further, this Court has held that no rights arise under an *ultra vires* contract, hence the pledged assets remain the property of the bank, and neither the United States nor the Canal Zone nor the individuals to whom the property was pledged acquired any right or interest in the illegally pledged securities.

At most these individuals acquired an unlawful possession, and likewise their successors in office acquired an unlawful possession and only such title as flows from such possession. As will be developed subsequently, respondent may recover his property, in the form of the bonds or their proceeds, from the person in possession without making the United States or the Canal Zone a party to the suit.

Since the pledge was void, respondent may recover his property from the person in possession, and the alleged official holding of petitioners cannot be sustained because they are unable to produce lawful statutory authority for their retention of respondent's property.

The bill of complaint alleged in substance that after the opening of the Canal Zone deposit account in the Commercial National Bank, said bank unlawfully and illegally pledged certain of its assets to the then Secretary of War, as security for the Canal Zone deposits therein made; that after suspension said Secretary of War took over said bonds and that upon said taking, said bonds became a trust and were held as such by petitioners, and respondent claimed the return of said bonds—or if sold, the proceeds derived from such sale—and prayed for a decree requiring petitioners to account therefor.

The petitioners admitted the allegations of fact recited above, but denied that the said bonds became or were a trust, or that the bank lacked capacity to pledge said bonds

as security for the deposits, and said petitioners, in their answer, further averred (R. 83):

> "Said defendants admit the allegations of fact contained in subparagraph four of paragraph 12 but deny that the said bonds became or were a trust and were held as such by the then Secretary of War or the then General Purchasing Officer and Chief of the Washington Office, Panama Canal, or are so held by their successors in office for the alleged beneficiaries, and deny that plaintiff is entitled to the return of said bonds or to the proceeds thereof as alleged in said subparagraph."

The Commercial National Bank case does not present the separate issue urged by petitioners in the case of *Woodring* v. *Wardell* where the proceeds of the bank's pledged assets have been placed in a bank to the credit of petitioners. Therefore, much of the argument of the brief in No. 5 is wholly inapplicable to the facts of record in the instant case and in the discussion hereinafter made on the right of respondent to recover from the individuals in possession of the bank's property, *it should be borne in mind that this suit is an action to recover respondent's property from the persons admittedly in possession, and the technical arguments advanced in the Wardell case by reason of the existence of the bank account in the Hamilton National Bank in that case have no application here.* The factual distinction is shown herein at pages 5-6.

It is necessary, in order to emphasize the underlying principle which entitles respondent to recover the bank's property from the possession of the petitioners, to note the fundamental distinction here existing between the original deposits made in the Commercial bank and the bonds now in the possession of the petitioners or the proceeds of the bonds originally pledged, which are the subject matter of this suit.

The Canal Zone deposits obviously were funds belonging to the Canal Zone Government when placed in the bank

and as to which a debtor-creditor relationship arose between the bank and the depositor. These funds are not the subject matter of this suit.

Inasmuch as this action is brought to recover the assets of the bank, and does not relate to the deposits made by officials of the Panama Canal, or the United States, neither the United States nor the Panama Canal is an indispensable party to this action. This conclusion is predicated upon a careful consideration of this question by this Court in the following cases:

> *U. S.* v. *Lee*, 106 U. S. 196, 213, 215;
> *Osborn* v. *Bank of the U. S.*, 9 Wheaton 738, 843, 844;
> *Tindal* v. *Wesley*, 167 U. S. 204, 223;
> *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619;
> *Ex parte Ayers*, 123 U. S. 443, 500;
> *Allen* v. *B. & O. Ry. Co.*, 114 U. S. 311, 315;
> *Poindexter* v. *Greenhow*, 114 U. S. 270, 288, 289;
> *Scott* v. *Donald*, 165 U. S. 58, 70;
> *Ickes* v. *Fox*, 300 U. S. 82, 87, 88;
> *U. S.* v. *Peters*, 5 Cranch (9) 115, 139, 140.

This Court in *Barney* v. *Baltimore*, 6 Wall. 280, 281, 284, classified parties to actions in traditional categories of "proper", "necessary", and "indispensable" parties, and as Judge Knox observed in *Baldwin* v. *Chase National Bank*, 16 F. Supp. 918, 920:

> "To be indispensable, the absent party must at least have such an interest in the subject-matter of the controversy that equity and the concepts of practical judicial administration necessitate his presence. *If the absentee be without legal or equitable* interest in the controversy, although his rights may be affected indirectly by the decision, he is not even a necessary party. (Citing cases.) A fortiori, *a party with no legal or equitable interest in the subject-matter is not an indispensable party.*" (Italics supplied.)

Respondent contends that the purported pledge of the bank's assets to the Secretary of War was *ultra vires* and

void, passing no interest in the securities to the intended pledgee and since the intended pledgee acquired no right or interest in the bank's pledged bonds, or the proceeds thereof, neither the United States nor the Canal Zone is an indispensable party herein.

Petitioners' sole defense in this phase of the argument is predicated upon the assertion of an interest of the United States in the proceeds of the pledged bonds, and they contend that the mere assertion of this interest is sufficient to preclude this Court examining the merits of the case. We have previously shown that no interest passed to the United States and it is also well established that the mere assertion of title in a sovereign is not sufficient to defeat the Court's jurisdiction.

In *Tindal* v. *Wesley*, supra, the Court said, at p. 221:

> "We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this Court in *United States* v. *Peters*, 5 Cranch, 115, 139: 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the Government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the State, nor one in which the plaintiff seeks to compel the specific performance by the State of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the State."

It is clear that to preclude this Court's jurisdiction the petitioners must show affirmatively that the United States has some lawful interest in the property and unless they can make good their assertion of title in the United States,

respondent is entitled to recover his property unlawfully held by these petitioners.

In *Osborn, et al.* v. *Bank of the U. S.*, supra, in which one Osborn, the Auditor of the State of Ohio, acting pursuant to a state statute, obtained and delivered to his successor in office $100,000 from the Bank of the United States as the amount of a tax assessed by the State, the defendants urged that they held the money soiely as officers of the State of Ohio, the owner thereof, and that "the court ought not to proceed without making the state a party", and if that could not be done, that the Court should not take jurisdiction of the cause (p. 846). The Chief Justice overruled the objection saying (p. 846):

> "The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. . . ."

The Chief Justice in holding further that, inasmuch as the statute of Ohio was unconstitutional and void, no party could obtain any right thereunder, and relief should be given in the case without making the State of Ohio a party, said (pp. 858-9):

> "But, it has been shown, we think, that an action of detinue might be maintained for that article, if the bank has possessed the means of describing it, and that the interest of the state would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial and effective.

> "It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

The decision of Chief Justice Marshall in *Osborn, et al.* v. *Bank of the U. S., supra*, and the principles enunciated in that case have been reaffirmed by this Court in numerous subsequent cases and the Court has consistently held in such cases that where the plaintiff seeks to recover his property in its original or changed form, a third party for whom the defendant purports to hold the property, or to whom defendant thinks he is indebted therefor, is not an indispensable party, particularly if he cannot be made a party to the cause.

In *Scott* v. *Donald*, 165 U. S. 58, this Court said at page 67:

> "A preliminary question is raised by the proposition that these are in fact suits against the state of South Carolina, and forbidden by the 11th Amendment. This question is sufficiently disposed of by referring to the late case of Re Tyler, 149 U. S. 164, where the conclusion of numerous previous cases was stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state."

In *United States* v. *Lee*, 106 U. S. 196, the Court, in holding that a plea of sovereign immunity on behalf of the United States was not well taken, and that the United States was not an indispensable party, said at page 210:

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

The doctrine under which respondent is entitled to recover from the petitioners is carefully analyzed by this Court in *In re Ayers*, 123 U. S. 444, 500, 501, 502, where it it is said:

"In pursuance of the principles adjudged in the case of *Osborn* v. *Bank of U. S.*, *supra*, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The grounds of this jurisdiction were stated in Allen v. Baltimore & O. R. R. Co., 114 U. S. 311. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the person or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindexter* v. *Greenhow*, 114 U. S. 270 as follows. [page 282] 'The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another.'

It was also stated [page 288], 'The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do.' The legislation under which the defendant justified being declared to be null and void as contrary to the Constitution of the United States, therefore, left him defenseless, subject to answer to the consequences of his personal act in the seizure and detention of the plaintiff's property, and responsible for the damages occasioned thereby.

"This principle is illustrated and enforced by the case of *U. S.* v. *Lee*, 106 U. S. 196. In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

The Respondent's Right to Recover His Property Cannot Be Defeated on the Ground That His Property Has Been Transferred to a Successor in Office.

Petitioners urge that while the action might have been maintained against the former Secretary of War as an individual in possession that the action must now fail because Secretary of War Woodring in acquiring the securities, must have taken them in an official and not individual capacity. The vice in this argument lies in the fact that if it be considered that the original taking by his predecessor in office was without authority in law it seems clear that his predecessor could pass no more title to his successor in office than he had obtained. It would hardly seem arguable that since the predecessor in office of the present petitioner acquired respondent's property in violation of law, the mere passing of that property over to the successor could operate to divest respondent of his ownership in the property or serve to create any interest, official or otherwise, in the property to the successor officer. The successor officer would, like his predecessor, be unable to show lawful authority for his holding and consequently his holding would be personal and subject to the rule set out in *In re Ayers, supra* (p. 501), that if he is unable to show any lawful authority under the United States there is nothing to prevent the judgment of the Court against him as an individual for his individual wrongful retention of respondent's property.

Further, petitioners' contention is fully answered by the decision of the court in *Osborn* v. *The Bank of the United States, supra*. In that case H. M. Curry, the then Treasurer of the State of Ohio, was the original recipient of the $100,000.00 in specie and bank notes belonging to the plaintiffs and he was succeeded in office by S. Sullivan, who was the present Treasurer, and he gave a receipt for the moneys. This court concluded at page 870:

"We think, then, that there is no error in the decree of the Circuit Court for the district of Ohio so far as it directs restitution of the specific sum of $98,000, which was taken out of the bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of $2,000 by the defendants, Ralph Osborn and John L. Harper."

The test that must be applied by the Court is that of ownership and since it has been conclusively shown that respondent is the owner of the property for which this action has been instituted and the petitioners who have possession of the property are unable to show any authority in law for their holding, the defense of indispensability of parties must fail.

The contention that petitioners as government officials have decided a doubtful question arising out of a voluntary commercial transaction and therefore are not subject to suit ignores the basic principle that the pledge was unlawful and void, because ultra vires the bank, hence any official administrative decision thereon would be a nullity.

The substance of petitioners' argument on this point is that the power of the national bank to pledge its assets to secure the deposits in question is at least doubtful, and when the Secretary of War accepted a pledge from the bank, he was exercising executive discretion which might not now be examined into or controlled by the Court. Respondent has no quarrel with the doctrine that when Congress has vested discretionary powers in an administrative official and he has exercised those powers, whether rightly or wrongly, his determination is not subject to review.

However, the argument and the cases supporting such argument are without application here because Congress

has not authorized the Secretary of War in his discretion to exact security from the national bank. In the absence of any Act of Congress either authorizing the bank to make the pledge or requiring the Secretary of War to exact it as a condition of the deposit, it appears clear that the Secretary of War was not exercising a discretion with respect to powers vested in him by Congress.

In conclusion on this point, it will be noted that in the case of *Berger* v. *Chase National Bank* (C. C. A. 2nd), decided July 24, 1939, relied upon by the petitioners herein, the Court with respect to the question of the necessity of additional parties, and in other procedural matters held:

> "If the pledges were illegal, it seems that the defendant has funds which in equity and good conscience it must return to the plaintiffs, and the procedural and other difficulties concerning parties, a formal trust res, and so on, do not avoid that conclusion."

III.

No Claim is Made that the Canal Zone Deposits in the Bank Were in Violation of Law and this Question is Not Before the Court for Consideration.

As admitted on pages 69-70 of their brief, petitioners' answer did not allege that the bank held the deposits as trustee *ex maleficio* and this issue as to the Canal Zone funds was raised in neither court below, nor was this issue urged in the petition as a basis for granting the writ of certiorari. Therefore, the question is not now before this court.

Rorick v. *Devon Syndicate Ltd.*, 307 U. S. 299;
A. Schrader's Sons, Inc. v. *Wein Sales Corporation*, 9 F. (2d) 306, 308;
U. S. ex rel. Mistoras v. *McCandless*, 61 F. (2d) 366, 368;
Helvering v. *Helmholz*, 75 F. (2d) 245, 246.

Petitioners while not contending that the deposits of Canal Zone funds were illegal, state on pages 70-73 that if the deposits were illegal then the bank held them in trust. Inasmuch as there is now no question as to the legality of the deposits there is no need to consider what relationship might have arisen had the deposits been illegal.

IV.

The Allowance of Interest as Awarded in the Judgments, While Not Assigned as Error or Argued Below or in the Petition for Certiorari, Was Proper as a Matter of Law.

The brief in the instant case, No. 6, does not contain any reference to the question of the allowance of interest, but in No. 5, to which reference is made in this brief, the petitioners urge that in any event the judgment should be reversed because of the allowance of interest to respondent.

In this connection it would appear proper to advise the Court that no objection was made to the allowance of interest in the decree; the decree was consented to as to form; no assignment of error was made with respect to the allowance of interest; the point was neither briefed nor argued in the U. S. Court of Appeals for the District of Columbia; nor was it urged or relied upon in either of the petitions for *certiorari*.

In this situation it would appear that petitioners have lost all right to urge this as a ground of reversal in this Court and that it should not be noticed.

A. Schrader's Sons, Inc. v. *Wein Sales Corp.*, (C. C. A. 2) 9 F. (2d) 306, 308;
U. S., ex rel. Mastoras v. *McCandless* (C. C. A. 3) 61 F. (2d) 366, 369;
Helvering v. *Helmholz*, (U. S. C. A., D.C.) 75 F. (2d) 245, 248;
Rorick v. *Devon Syndicate, Ltd.*, 307 U.S. 299.

In the last cited case the Court said, at page 303:

> "Of the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175; *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. 493."

The various circuits of appeal have consistently awarded interest in cases of this character and this Court has consistently denied certiorari.

In the case of *Redfield Independent School District No. 20* v. *Schnetzer*, 94 F. (2d) 257, the Trial Court awarded interest from the date of the conversion of the illegally pledged securities, which was noted by the Appellate Court, where in its opinion on page 258 it said:

> "The trial court held that the pledge was void; that the school district was an unsecured creditor which had, by mistake, received an overpayment out of the assets of the insolvent estate; and that *the receiver was entitled to recover the overpayment with interest.* Judgment was entered accordingly." (Italics supplied.)

The Appellate Court concluded at page 259:

> "The judgment of the court below was correct and is affirmed."

In *Hood* v. *Hardesty*, 94 F. (2d) 26, the trial court granted interest from the date of the preferential payment to the State bank receiver, and the allowance of interest was included in the general affirmance of the Circuit Court without comment.

In *City of Chicago* v. *Joseph*, 95 F. (2d) 444, cert. den. 304 U. S. 578, the court in awarding interest, stated at page 447:

> "When the city wrongfully retained the property of plaintiff and converted it into money, it committed a

wrongful act and is *chargeable with interest* from the time of demand." (Italics supplied.)

The District Court there having failed to allow interest, the Appellate Court ordered at page 447:

> "The judgment is reversed, with directions to the District Court to enter one for the same amount with interest at 5 per cent. from the date of demand and the costs in that court."

And see *La Parr* v. *City of Rockford* (C. C. A. 7), 100 F. (2nd) 564, 568, cert. denied No. 721, U. S. S. Ct., May 1, 1939. *Downey* v. *City of Yonkers* (S. D. N. Y.), 23 Fed. Sup. 1018, 1024, affirmed *Downey* v. *City of Yonkers* (C. C. A. 2), Aug. 3, 1939.

STATEMENT OF FACTS AS TO THE MERCHANT FLEET CORPORATION

The Merchant Fleet Corporation, under its former title, U. S. Shipping Board Merchant Fleet Corporation opened a deposit account with the Commercial National Bank on or about August 18, 1917, but according to the answer this account was closed on or about August 5, 1918 (R. 30) and so does not figure in the instant case.

On December 1, 1921, the Fleet Corporation opened a deposit account with the Commercial National Bank under the name and caption, "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account," and this account was continuously maintained in the Bank up to the time of closing. (R. 37-38). The purpose for opening this account is shown in the following resolution of the Board of Trustees of the Fleet Corporation, adopted December 1, 1921: (R. 38)

> "Whereas, In the interests of the United States it is desirable to facilitate the negotiation of checks drawn on depositaries other than the Treasurer of the United States,

"Resolved, That the Treasurer of the United States Shipping Board Emergency Fleet Corporation be and he is hereby authorized to open an account with the Commercial National Bank of Washington, D. C., a constituent member of the Federal Reserve and a government depositary, in the name of the United States Shipping Board Emergency Fleet Corporation, subject to the check of the Treasurer, this account being established for the purpose of depositing for immediate collection checks drawn in favor of the Emergency Fleet Corporation on depositaries other than the Treasurer of the United States; proceeds from said checks to be placed in said account to the credit of the Emergency Fleet Corporation in order that they may be available for immediate expenditure by the Emergency Fleet Corporation or transfer to the Treasury of the United States."*

This account was composed of moneys derived from proceeds of sale of Government vessels, revenues from the operation of Government vessels, rentals from real estate owned by the United States, bank interest and miscellaneous revenues (R. 38), and were obtained by the Fleet Corporation either as a result of appropriations by Congress for expenses of the Corporation (R. 37) or else from the operation of the Corporation.

Pursuant to Section 14 of the Merchant Marine Act of 1920, Appendix p. 33, from time to time funds were transferred from this deposit account in the Commercial Bank and covered into the United States Treasury (R. 38). The Corporation also kept and maintained during all of this time, deposit-checking accounts in the Treasury where it deposited funds similar to those in the account of the Commercial Bank (R. 38-39).

The Fleet Corporation also opened a deposit account in the Commercial Bank on January 14, 1926, under the caption and designation "United States Shipping Board Mer-

* It will be noted that the Commercial National Bank was not designated by the Secretary of the Treasury as a depositary of public monies of the United States (R. 43).

chant Fleet Corporation, Agent, Good Faith Deposit Account." The moneys in this account consisted exclusively of funds derived as security for performance of sales or purchase proposals submitted to this petitioner as agent for the U. S. Shipping Board or other similar suspense items. The only disbursements from this account were to unsuccessful bidders for the return of their deposits or for deposit with the Treasurer of the United States when the bidder's deposit was forfeited or was credited on the transaction for which the deposit had been made (R. 39).

Originally both of the accounts of the Fleet Corporation in the Commercial Bank were unsecured, but on November 4, 1931, the Board of Trustees of the Fleet Corporation duly adopted the following resolution: (R. 39-40)

> "WHEREAS, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and
>
> "WHEREAS, it is provided under Title 12, Sec. 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and
>
> "WHEREAS, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress:
>
> "Resolved, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.
>
> "Further resolved, that the Treasurer of the United States Shipping Board Merchant Fleet Corporation be and he is hereby authorized and required to address to

each one of the said banks and banking institutions now having such monies on deposit, a letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively."

After the adoption of this resolution, Albert H. Denton, who was then a Commissioner of the United States Shipping Board and Chairman of said Board's Committee on Finance, was authorized to negotiate with the Commercial Bank to obtain security for the deposit of money in said bank by the Fleet Corporation. Negotiations were then had with the Bank, and with the Comptroller of the Currency concerning the deposits and the obtaining of the security therefor. The Bank was advised that unless adequate security was had the account would be closed (R. 40). As a result of these negotiations, and with the approval of the Comptroller of the Currency, the Bank entered into a contract, (Exhibit B1, R. 15-17) which was duly approved by the United States Shipping Board, December 9, 1931 (R. 41), with the Fleet Corporation which provided that the Bank would pledge certain Real Estate Notes to the Fleet Corporation to secure the deposits in the two accounts previously referred to, and that other security could be substituted for the said notes if they were acceptable to the Fleet Corporation.

On July 20, 1932, the Bank in a letter addressed to the Treasurer of the Fleet Corporation (Exhibit F-R. 69) requested to be advised as to whether a substitution of United States Government Bonds or Treasury Notes would be accepted by the Fleet Corporation in lieu of the Real Estate notes previously pledged. This proposal was accepted by the Shipping Board and the substitution was

made (R. 41). However, it will be noted that a substantial part of the securities substituted were not actually the property of the Commercial Bank but were borrowed from another institution (R. 51)

On February 27, 1933, when the Bank suspended operations and was closed (R. 30), there was in the Merchant Fleet's "Deposit Account" the sum of $264,302.16, and in its "Good Faith Account" the sum of $144,995.12, and on March 8, 1933, the Treasurer of the Fleet Corporation conferred with certain officials of the Division of Insolvent National Banks to determine what method should be pursued in selling the collateral which secured the Fleet Corporation's deposits (R. 31). Acting under a mistake of law, the Receiver of the Bank notified the Fleet Corporation that he would interpose no objection to the sale of the bonds, and the bonds were then delivered to the Treasurer of the United States for safekeeping. After this delivery to the Treasurer of the United States, the Receiver of the Commercial National Bank, acting under a mistake of law, on April 13th and 18th, 1933, redeemed from the Fleet Corporation a portion of the assets so pledged by a payment to the Fleet Corporation of $281,695.31. The remainder of the assets pledged by the Bank to the Fleet Corporation were sold by the Corporation on April 17, 1933, for the sum of $125,929.69.

STATEMENT OF FACTS AS TO THE INLAND WATERWAYS CORPORATION

By the Act of June 3, 1924 (43 Stat. 360) the Inland Waterways Corporation was formed for the purpose as declared by Congress "of carrying on the operation of the Government owned inland, canal and coastwise waterways system to the point where the system can be transferred to private operation * * * of carrying out the mandate of Congress prescribed in Section 201 of the transportation Act of 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of Section 500 of such Act. * * *"

This Act fixed the capital stock of the Waterways Corporation at $5,000,000 subscribed for by the United States, and paid to the Secretary of War, who the Act provided should be the incorporator, and who should govern and direct the corporation in the exercise of its functions. (R. 77)

The Corporation was directed to continue the operation of the transportation and terminal facilities then being operated by the Secretary of War, and directed the Secretary of War to transfer to the corporation all assets acquired, constructed, or operated by or under the direction of the said Secretary, or which reverted to the United States, under Section 201 of the Transportation Act of 1920.

On the 18th day of July, 1930, the Inland Waterways Corporation opened a Savings Deposit Account in the Commercial Bank, and on the 5th day of March, 1931, a checking account was opened pursuant to express agreements between the Bank and the officers of the Waterways Corporation, whereby it was agreed that in consideration of deposits by the Corporation, the Bank would deposit in the Federal Reserve Bank at Richmond, Virginia, subject to defendant's order and control, certain securities to safeguard the deposits. Pursuant to these agreements securities were deposited with the Federal Reserve Bank in Richmond, Virginia, subject to the Corporation's order and control, and the deposit accounts were opened. (R. 74). The moneys in these accounts were composed in part of revenues received from the operation of the corporation, and in part from the appropriation made by Congress as a stock subscription. (R. 79).

The demand of security for deposits was pursuant to the by-laws of the Inland Waterways Corporation promulgated on August 7, 1924 by the Secretary of War. (R. 75) Under said by-laws the Secretary-Treasurer of the Corporation was named as accountable officer, and his duties were specified as follows:

"It shall be his duty to collect, receive, and hold the moneys, notes, bonds, certificates of stock, and other evidences of value and security of the Corporation, and deposit them in such depositaries under such conditions as may be approved by the Secretary of War."

The Secretary of War approved the deposit of the funds and required the Secretary-Treasurer of the Waterways Corporation to secure the deposit of funds by the pledging of bonds, in accordance with the by-laws afore-mentioned. (R. 75)

At the suspension of the Bank on April 20, 1933, the amount in the savings account was $271,113.05 and in the checking account $211,543.52. After such suspension the Receiver of the Bank, under a mistake in law, redeemed from the Inland Waterways Corporation part of the pledged assets consisting of United States 4¼% Liberty Bonds of 1933-1938 of a par value of $245,000, by the erroneous payment to said corporation of the sum of $245,000. On or about the same date the Waterways Corporation sold the remainder of the collateral pledged by the Bank for the sum of $261,215.63.

SUMMARY OF ARGUMENT

I.

National banks have no power to pledge their assets to secure deposits of the Merchant Fleet or Inland Waterways Corporations. There is no inherent or implied power in national banks to pledge their assets to secure deposits of public money of the United States, the only power to secure public money being found in Section 45 of the National Bank Act or subsequent acts of Congress specifically providing for the securing of Federal funds not here involved.

The deposits of the Merchant Fleet and Inland Waterways Corporations are not public monies of the United States within the purview of Section 45 of the National

Bank Act, nor has there been any compliance with the provisions of said section.

II.

The deposits made by the Merchant Fleet Corporation and the Inland Waterways Corporation in the Commercial National Bank were legal, and created a debtor-creditor relationship, since there is no statutory restriction prohibiting the deposit of funds of these two corporations.

ARGUMENT AS TO THE MERCHANT FLEET CORPORATION AND THE INLAND WATERWAYS CORPORATION

I

National Banks Have No Power to Pledge Their Assets to Secure Deposits of the Merchant Fleet Corporation or the Inland Waterways Corporation.

Both the Merchant Fleet Corporation and the Inland Waterways Corporation contend that the pledges of assets made by the Commercial National Bank to secure their respective deposits were legal, and as a basis for this contention argue that these two corporations being instrumentalities of the Federal Government, and therefore their funds being public funds, there is an implied power on the part of national banks, likewise instrumentalities of the Government, to pledge their assets to secure deposits of such federal funds. This contention is identical with one advanced as to the deposits of the Canal Zone funds, and has been answered in the preceding part of this brief, ante, page 8 to page 13, where it was pointed out that this court, in *Marion* v. *Succden*, 291 U. S. 262, *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Lewis* v. *Fidelity Company*, 292 U. S. 559, determined that national banks had only those powers expressly granted by acts of Congress, and had no inherent or implied power to secure deposits of either public or private funds.

It has also been shown that, aside from certain pledges specifically authorized by Acts of Congress and limited to particular deposits not here involved, the only power granted by the National Bank Act to national banks to pledge their assets is found in Sec. 45 of that Act, and is limited to deposits of public money of the United States made by the Secretary of the Treasury in authorized depositories. These principles of law have been dealt with fully in connection with the Canal Zone deposits, and are equally applicable to the deposits made by the Merchant Fleet Corporation and the Inland Waterways Corporation; therefore, there is no need here to repeat what has previously been said.

These petitioners have been unable to point to any Act of Congress which specifically authorizes national banks to pledge their assets to secure deposits either of the Merchant Fleet Corporation or the Inland Waterways Corporation, or any Act which requires either of these two corporations to exact pledges as a condition to depositing their funds. In the absence of any such Act of Congress, specifically dealing with deposits of the Merchant Fleet or Inland Waterways corporation, we turn to an examination of these deposits in relation to Sec. 45 of the National Bank Act, and will demonstrate that the pledges cannot be considered as having been authorized by this Section.

We have previously pointed out in this brief, ante. pages 13 to 17, that Sec. 45 of the National Bank Act must be read in the light of the other Acts of Congress dealing with the public money of the United States, and that the term "public money" of the United States as used in these statutes, is limited to money under the control of the Secretary of the Treasury. In our judgment it is quite apparent that neither the funds of the Fleet Corporation nor those of the Inland Waterways Corporation are "public money" within the meaning of Sec. 45, or of any of the other acts of Congress dealing with the public money of the United States.

As to the Fleet Corporation.

An examination of the facts concerning the deposits in the two accounts maintained by the Fleet Corporation in the Commercial Bank indicates that in the "Agent Account" the moneys were derived from proceeds of sale of properties, rentals from real estate and other funds received by the Corporation in the ordinary course of its business, as well as money appropriated by Congress to the Fleet Corporation for the purpose of paying the operating expenses of the Corporation.* (R. 37-38.) The money in the "Good-faith Account" was derived from funds delivered to the Corporation as security for performance of sales or purchase proposals or similar suspense items (R. 39), and a great part of it would have been ultimately returned to the private parties who were the equitable owners of said money.

There is no question that the deposits made by the Fleet Corporation consisted simply of funds obtained by it in the ordinary course of its business, or of funds which had been made available to the Corporation for the conduct of its business by the appropriation acts of Congress.**

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* It will be noted that Sec. 495 Title 31 U. S. C. which covers "Deposits of public money, public depositories, receipts, postal revenues" and which requires the deposit "of moneys of the U. S." in the Treasury or in an authorized depository, expressly exempts money required for current expenditures.

** Congress has, by its annual appropriations acts, made available to the Corporation for its corporate purposes the funds which the Corporation deposited in the Commercial National Bank. *See:* Act of June 15, 1917, c. 29, 40 Stat. 182, 183; Acts of October 6, 1917, c. 79, 40 Stat. 345; July 1, 1918, c. 113, 40 Stat. 634, 650; June 5, 1920, c. 235, 41 Stat. 874, 891; March 4, 1921, c. 161, 41 Stat. 1367, 1382; August 24, 1921, c. 89, 42 Stat. 192; June 12, 1922, c. 218, 42 Stat. 635, 647-648; February 13, 1923, c. 72, 42 Stat. 1227, 1241-1242; June 7, 1924, c. 292, 43 Stat. 521, 530-531; March 3, 1925, c. 468, 43 Stat. 1198, 1209-1210; Acts of May 16, 1928, 45 Stat. 573, 585; February 20, 1929, 45 Stat. 1230, 1244; April 19, 1930, 46 Stat. 229, 244; February 23, 1931, 46 Stat. 1355, 1371; June 30, 1932, 47 Stat. 452, 467; June 16, 1933, 48 Stat. 283, 298.

The decisions of this court dealing with the status of the Fleet Corporation and the purpose for its incorporation leave no doubt that the primary objective in forming this corporation was to enable the Government to use commercial methods and to be *free of the various restrictions and safeguards* pertaining to public money of the United States.

In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, a petition was filed for a Writ of Mandamus, seeking to compel the Comptroller General to pass upon the claims arising out of contracts with the Fleet Corporation. In affirming the action of the court below in dismissing the petitions this court had occasion to analyze the statutes under which the Fleet Corporation was created and from which its powers are derived, and pointed out, as indeed is perfectly obvious, that the main purpose for forming the Fleet Corporation was so that its financial operations might be free of the various restrictions which are placed upon public moneys of the United States. In this connection this court on pages 7 and 8 of its opinion said:

> "At no time, during the War, or since its close, have the financial transactions of the Fleet Corporation passed through the hands of the general accounting officers of the Government or been passed upon, as accounts of the United States, either by the Comptroller of the Treasury or the Comptroller General. The accounts of the Fleet Corporation, like those of each of the other corporations named, and like those of the Director General of Railroads during the Federal Control, have been audited, and the control over their financial transactions has been exercised, in accordance with commercial practice, by the board or the officer charged with the responsibilities of administration. Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

In *United States v. Strang et al.*, 254 U. S. 491, in speaking of the status of the Fleet Corporation, at page 493, the Court said:

> "The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think that they were not agents of the United States within the true intendment of Sec. 41.
>
> "Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation."

In *Sloan Shipyards Corporation, et al.* v. *United States Shipping Board Emergency Fleet Corporation and the United States*, 258 U. S. 549, at pages 569, 570, the Court said:

> "The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States. The judgment in this case also must be reversed."

In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl, supra*, the Court said at pages 5 and 6:

> "The Fleet Corporation was organized on April 16, 1917—ten days after the United States declared war. All of its stock was subscribed and paid for by the Shipping Board on behalf of the United States. And

all the stock has been held by it since. The Company was formed by the Shipping Board pursuant to the specific authority to form one or more corporations, which was conferred by the original Shipping Board Act, September 7, 1916, c. 451, Sec. 11, 39 Stat. 728, 731. Congress conferred this authority in contemplation of the possibility of war, and it required that any such corporation should be dissolved 'at the expiration of five years from the conclusion of the present European War.' The Fleet Corporation is thus an instrumentality of the Government. See *United States v. Walter*, 263 U. S. 15, 18. But it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct, and operate merchant vessels. The Act authorized the Board 'to sell with the approval of the President, any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein.' Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations; it does not enjoy the priority of the United States in bankruptcy proceedings. *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549; and its employees are not agents of the United States, subject to the provisions of Sec. 41 of the Criminal Code. *United States v. Strang*, 254 U. S. 491. Compare 34 OP. Atty. Gen. 241."

Decisions of this Court have established the following principles of law as to the Fleet Corporation:

(1) It may be sued in the State or Federal courts like other private corporations.

United States ex rel. Skinner & Eddy Corporation v. McCarl, 275, U. S. 1, 6.

(2) It does not enjoy priority of the United States in bankruptcy proceedings.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, 574.

(3) Its employees are not agents of the United States subject to the provisions of Sec. 41 of the Criminal Code.

United States v. *Strang*, 254 U. S. 491, 493.

United States ex rel. Skinner & Eddy Corporation v. *McCarl, supra* at page 12.

(4) Its financial transactions are not required to pass through the General Accounting offices of the Government.

United States ex rel. Skinner & Eddy Corporation McCarl, supra at page 7.

(5) It may sue in its own name and not necessarily through the Attorney General's office.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at page 565.

(6) Suits against it do not have to be brought in the Court of Claims.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at pages 569-70.

(7) It is liable for breach of contract.*

United States ex rel. Skinner & Eddy Corporation McCarl, supra 6.

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp. supra* at page 570.

In view of these decisions as to the purposes for the formation of the Fleet Corporation and its status, there would seem to be no doubt that it is substantially the same as a private corporation and is entirely free from the restrictions placed by Federal Statutes upon public property and public monies of the United States. The Fleet Corporation as a Government corporation comes within the rule laid down by this Court in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907, where it was said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends

* Nor is there any question as to the corporation's being suable in tort. *Kiefer & Kiefer v. R. F. C.*, 306 U. S. 396, 398.

to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the Corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank, Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Subsequent to the decisions of this Court, dealt with on the preceding pages, a controversy arose between the United States Shipping Board and the Comptroller General of the United States which is set forth in an exchange of letters between these two branches of the Government.

In their brief, petitioners have referred only to two letters from the Comptroller General to the Shipping Board and have set these letters forth in full on pages 28-35 of the appendix to their brief. We think it desirable that the Court should have before it both sides of the correspondence on the subject. Consequently, we have included in the appendix hereto, pages 34-50 the letters of the Shipping Board and the replies of the Comptroller General.

An examination of these letters indicates that the Comptroller General by letter of June 16, 1931, advised the Shipping Board that in his opinion the monies derived from the business operation of the Fleet Corporation were monies of and for the use of the United States and should be covered into the Treasury. The Fleet Corporation, on the contrary, insisted that this money, while money of the United States in the sense that the United States owned all of the stock of the Fleet Corporation and, therefore, was the ultimate beneficiary, was not money of the United States within the meaning of the various statutes dealing with public money of the United States and pointed out the various decisions of this Court indicating that the purpose of Congress was to have the Corporation function free of the restrictions which applied to public moneys of the United States as such.

It is interesting to note from the letter of February 29, 1932, that the Shipping Board did not consider the deposits made in the Commercial National Bank by the Fleet Corporation as being the character of money covered by Section 45 of the National Banking Act (Sec. 90, Title 12, U. S. C.).

In this connection, the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General of the United States, appendix pages 45-50, states:

> "By reason of the fact that complete ownership of the capital stock of the Merchant Fleet Corporation rests in the United States, it is apparent that in the final analysis, funds of the Corporation are moneys of the United States, and this fact the Shipping Board has never denied. We do believe, however, and in this belief are supported by decision of the Comptroller of the Treasury of the United States of December 12, 1919, which has previously been brought to your attention, that moneys of the Merchant Fleet Corporation are *not* moneys of the United States which are required to be deposited in the Treasury or in a designated depository as public moneys."

The fact that the Fleet Corporation did not feel that it was required to comply with Section 45 of the National

Banking Act is also clear from the record, since the contract, (Ex. B-1, - R. 15), by which the Commercial National Bank pledged its assets to secure the deposits made by the Fleet Corporation provide for the pledging of real estate notes, which are not a type of security permissible for securing public money of the United States. This is also brought out in the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General, appendix, pages 45-50 wherein it is stated:

> "You also offer objections to the nature of the collateral furnished by the Commercial National Bank to secure this account. As previously stated, the Shipping Board does not consider itself bound by the requirements of Title 12, section 90 of the Compiled Statutes, and for this reason believes it was fully justified in accepting as collateral for this deposit, a different form of security than that specified by Circular No. 176, issued by the Treasury Department pursuant to said statute. For reasons which the Shipping Board considered sufficient, the Commercial National Bank was not willing to furnish government bonds as collateral, so the Board accepted deeds of trust on real property in the District of Columbia, including the land and building on and in which the bank in question is located. The appraised value of the security which was furnished, far exceeds the average balance of the bank account, so the deposit is believed to be properly safeguarded."

From the foregoing, we think it is clear that neither this Court in its various decisions as to the nature of the Fleet Corporation, the Congress of the United States nor the Shipping Board, considered the funds of the Fleet Corporation as public money of the United States within the meaning of any of the statutes dealing with this subject.

It might also be added that Regulation D of the Federal Reserve Board, series of 1930, effective October 31, 1930, for the government of members banks does not classify deposits of the Merchant Fleet as public money of the United States. Sub-division g of Section II of this Regulation provides:

"(g) Government deposits. The term 'Government deposit' shall mean deposits of public moneys by the United States in designated depositaries."[1]

The footnote to this provision provides:

[1] "The following classes of deposits, however, are *not* Government deposits within such meaning and are *not* exempt from reserve requirements.'

"(1) Deposits of Philippine funds made by the Philippine Government and carried under the title, 'Treasurer of the Philippine Islands currency reserve fund account'.

"(2) Deposits of Porto Rican funds made by the Porto Rican Government.

"(3) Deposits of Indian funds under the control of the Department of the Interior.

"(4) Deposits of States, counties, or municipalities.

"(5) *Deposits of the United States Shipping Board and the Emergency Fleet Corporation.*" (Italics supplied).

As to the Inland Waterways Corporation.

What has been said as to the character of the Fleet Corporation and its funds is equally applicable to the Inland Waterways Corporation, which while engaged in a different type of activity is none the less a Governmental corporation, which like the Fleet Corporation, conducts a business which is not strictly governmental, but is for the most part commercial.

Just as in the case of the Fleet Corporation, the admitted facts in the record disclose that the Inland Waterways Corporation's funds are not subject to the restrictions placed upon public money of the United States. The money in the Inland Waterways accounts with the Commercial National Bank was composed in part of revenue received from the operation of the corporation and in part from the appropriation made by Congress to pay for the stock of the Corporation. (R. 79). The deposits were subject not to the control of the Secretary of the Treasury, but of the Secretary of War, and under the by-laws of the Inland Waterways Corporation its Secretary-Treasurer was the officer

responsible for the money received by the corporation in the conduct of its business.

There Has Been No Compliance by the Fleet Corporation or the Inland Waterways Corporation With Sec. 45 of the National Bank Act (Sec. 90, Title 12, U. S. C.)

There is no need to repeat what has been previously said, ante, pp. 17 to 20, in connection with the requirements of Sec. 45 of the National Bank Act. The terms of the section expressly limit its application to pledges exacted by the Secretary of the Treasury, upon deposits of public money of the United States made by his direction and subject to his control. It is also, of course, obvious that this section applies only to banks designated as depositories of public money by the Secretary of the Treasury. The deposits of the Merchant Fleet Corporation and the Inland Waterways Corporation cannot be considered as public money of the United States as that term is used in Section 45, and also it is admitted that the Commercial National Bank was not designated by the Secretary of the Treasury as a depository of public money (R. 43). These facts alone would be sufficient to negative any allegation that the pledges were authorized by Sec. 45, but an examination of the answers of these two petitioners indicates that no other requirement of Sec. 45 has been met.

Considering first the answer of the Fleet Corporation, we find that on December 1, 1921, its 'Agent' account was opened with the Commercial National Bank (R. 38-39) and on January 14, 1926, its 'Good-Faith' account was opened with said bank (R. 30). Neither of these accounts were secured until December, 1931, which, of course, negatives any idea that they were made by the Secretary of the Treasury pursuant to Sec. 45. When security was finally taken it was the result of negotiations between the representative of the Shipping Board and the bank and approval by the Comptroller of the Currency and not the Secretary of the Treasury (R. 40-41). The record also indicates that

changes in the security were made by the bank with the permission of the Fleet Corporation (Ex. F.-R. 69 and R. 41). Hence, there is no question that the deposit was made by the Fleet Corporation rather than the Secretary of the Treasury (R. 43), and was not subject to the check or control of the Secretary of the Treasury.

In addition to these facts of record, the letter of February 29, 1932, from the Chairman of the Shipping Board to the Comptroller General of the United States, appendix pp. 45-50, previously referred to, clearly indicates that the officials in charge of the Fleet Corporation had no intention of complying literally with Sec. 45 of the National Bank Act, which they realized was limited to public money of the United States, and had no application to the funds which the Fleet Corporation was depositing in the Commercial National Bank. It is also clear that the securities in question were exacted by the Fleet Corporation, subject entirely to the Fleet Corporation's judgment as to what constituted sufficient security and, in fact, were not the type of security required as to deposits of public money made pursuant to Sec. 45. Similarly, as to the Inland Waterways Corporation, it will be noted that it opened a savings deposit account in the Commercial National Bank on July 18, 1930, and a checking account on March 5, 1931 (R. 3, 74), and these deposit accounts were secured pursuant to express agreements between the bank and the office of the Corporation, these securities being deposited with the Federal Reserve Bank in Richmond, Virginia, subject to the Inland Waterways Corporation order, and control (R. 74).

The demand for security was made pursuant to the by-laws of the Inland Waterways Corporation, promulgated by the Secretary of War who approved the deposit of the Corporation's funds in the Commercial National Bank, and required the Secretary-Treasurer of the Inland Waterways Corporation to exact security for the deposit (R. 75).

These facts which are set forth in this petitioner's answer leave no doubt that the deposit and the pledge of assets

securing it were altogether outside of Sec. 45 of the National Bank Act, and that the Secretary of the Treasury had nothing to do with either the deposit or the pledge securing the same.

II.

The Deposits Made by the Merchant Fleet Corporation and the Inland Waterways Corporation in the Commercial National Bank Were Lawful, and Did Not Create a Relationship of Trustee and Cestui Que Trust.

The preceding sections of this brief have dealt with the legality of the pledges of assets made by the Commercial National Bank to secure the deposits of the various petitioners and, therefore, have related entirely to property of the bank which respondent is seeking to recover from these petitioners. It is suggested by petitioners, however, as to the Merchant Fleet Corporation and the Inland Waterways Corporation that the original deposits made in the Commercial National Bank might be considered as illegal, and, that if so, they were held by the bank as trustee.

This suggestion is discussed on pages 62-73 of petitioners' brief, and as a result of this discussion petitioners ultimately conclude that the deposits were legal, but suggest several statutes which they submit to the court for consideration. At the outset it will be noted that all of these statutes deal with public money of the United States, and as we have shown, one of the chief purposes for the formation of the Merchant Fleet and Inland Waterways Corporations was to allow them to conduct their fiscal affairs free from the restrictions placed upon public money of the United States, and we have pointed out the distinction between public money of the United States and money in which the United States has merely an ultimate beneficial interest.

Because of the character of these two corporations' activities, and the purposes for which they were formed, we submit that their funds are entirely outside of the purview of

any of the statutes dealing with public monies of the United States, which require such monies to be covered into the Treasury of the United States.

In *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549, the Fleet Corporation brought a claim against a bankrupt estate, claiming priority under Sec. 3466 of the Revised Statutes of the United States, which grants priority to debts due the United States in insolvent estates. This court recognized the distinction between a claim (which, of course, is property) owned by the Fleet Corporation and a direct claim of the United States, made by it, on its own behalf.

In connection with the claim of priority, the court said at page 570:

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation in the District of New York, under a contract similar to that last described, made by the Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the Referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred."

Turning to an examination of the specific Acts which petitioners suggest as raising the question of the legality of the various deposits, we shall consider first R. S. Sec. 5497, 18 U. S. C., Sec. 182, which is set out in full in the appendix hereto, page 9. This statute makes it unlawful for an unauthorized depositary of public monies to receive from any agent "any public money on deposit."

As we have pointed out previously in this brief, ante., pages 13 to 17, Congress has established a plan for the receipt and custody of public money of the United States, and has required such money to be covered into the Treasury or placed in authorized depositaries of public money. To insure compliance with these requirements, provision has been made in the Criminal Code for penalties upon those who fail to comply with the statutory requirements. Sec. 182 of Title 18 makes the banker, broker or other person unlawfully receiving a deposit of public money guilty of embezzlement.

The preceding sections of the Code (e.g., Sec. 173, 174, 175) are restrictions upon the officers of the United States having public money in their possession. Manifestly, Sec. 182 must be read in the light of both the other criminal provisions and the statutes dealing with the handling of the public money of the United States, and since, as we have shown, money of the Merchant Fleet Corporation and the Inland Waterways Corporation is not public money of the United States within the meaning of these statutes, Sec. 182 does not apply.

Nor do we think there is any basis for contending that either the Merchant Fleet Corporation or the Inland Waterways Corporation was prohibited from putting their money in banks just as a private corporation can.

Sec. 182 of Title 18 U. S. C. is the only statute which is suggested by petitioners as invalidating the deposits of the Inland Waterways Corporation, and we think it is clear that the conclusion reached on pages 64-65 of petitioners' brief, that this section of the Criminal Code has no application to the deposits of the Inland Waterways Corporation, is correct. For the same reasons we think it has no application to the deposits made by the Fleet Corporation.

As to the Fleet Corporation petitioners further point out that in 1923 that corporation formally conveyed its personal property to the United States and it is said that the money deposited by the Corporation in its "Agent deposit account"

was proceeds of the sale of various property belonging to the United States, and which had come into the corporation's hands as agent. These funds, petitioners contend, therefore, are of a type which the statutes of the United States require to be covered into the Treasury. We think that the decisions of this court dealing with the nature of the Fleet Corporation, which have been fully discussed on pages 62 to 70, leave no doubt that the funds of the Fleet Corporation are not required to be covered into the Treasury, but any doubt on this score is completely eliminated by an examination of various appropriation acts of Congress dealing with the Fleet Corporation.

In every appropriation act since 1920, Congress has appropriated the money which the Fleet Corporation received in the course of its operations to the use of the Fleet Corporation, which, of course, eliminated any requirement that this money be covered into the Treasury. With this in mind, it is clear that R. S. 3617 (31 U. S. C. Sec. 484) has no application. This Section provides:

> "The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department."

We call attention to the words "except as otherwise provided" and point out that Congress did otherwise provide as to money received by the Fleet Corporation from the sale of Government property since the appropriation acts made such money available to the Corporation to meet its operating expenses. In short, money which the Fleet Corporation received from the sale of Government property and not by it covered into the Treasury was, because of the appropriation acts, not received "for the use of the United States" but for the use of the Fleet Corporation.

The same comments which have been made as to Sec. 3617 apply to the other statutes set out by petitioners in this connection. The appropriation acts of Congress, set forth in the footnote, below, by expressly making the proceeds of the sale of vessels and other property in liquidation available to the Fleet Corporation as corporate funds for the purpose of meeting its operating and other expenses, constitute express statutory authority exempting the proceeds from the statutes referred to by petitioners.

As is shown by its letter of August 19, 1931, and its letter of February 29, 1932, to the Comptroller General of the United States, appendix pp. 45-50, the U. S. Shipping Board did not consider the monies of the Fleet Corporation as in any way subject to the statutes requiring public money to be covered into the Treasury, and felt that the appropriation acts, by making the funds derived from the sale of vessels and other property in liquidation available to the Fleet Corporation for the conduct of its activities, clearly relieved this money from any requirement that it be covered into the Treasury of the United States.

This conclusion, of course, is implicit in the decision of *Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1. which held that the monies of the Fleet Corporation were not required to pass through the General Accounting Office, as is the case with public money of the United States, and were not subject to the usual restrictions imposed upon the handling of public monies of the United States.

In view of the appropriation acts* making the funds here in question available for the Fleet Corporation, for use in the conduct of its activities, and in view of the nature of

* Congress, in the Merchant Marine Act of June 5, 1920, c. 250, Sec. 14, 41 Stat. 993, provided that the net proceeds derived by the Shipping Board prior to July 1, 1921, from its activities should be covered into the Treasury "except such an amount as the Board shall deem necessary to withhold as operating capital" and that, "After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and con-

this Corporation, as set forth in the decisions of this court previously referred to, it is clear that the legality of the deposits in the Commercial National Bank does not stand upon any implied ratification by Congress in disposing of the interest thereon, but was expressly authorized by Congress in the creation of the Fleet Corporation, and in the subsequent appropriation acts making available to the Corporation the funds, deposited in the Commercial National Bank.

CONCLUSION.

It is respectfully submitted that the decision of the court below holding the pledges in the instant case invalid and affirming the judgment against petitioners was correct and should be affirmed.

Respectfully submitted,

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struction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts." Coincident therewith, and by subsequent annual appropriation acts, Congress made available to the Merchant Fleet Corporation funds to carry out its corporate purposes. Petitioners suggest that the legality of the deposits results from the Acts of Congress making the interest earned on the funds deposited in the bank available to the Corporation. Obviously, the legality of the deposits must be considered in the light of the Merchant Marine Act of 1920 and the annual appropriation acts which made funds available to the Merchant Fleet for its corporate purposes. The interest statutes merely removed any doubt that might have existed as to the necessity of covering the interest earned on their deposits into the Treasury.